Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-130

ROBERT J. QUINN, individually and as Commissioner of the Chicago Fire Department,

Petitioner,

vs.

FRANCIS MUSCARE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

Petition For Certiorari Filed July 24, 1975
Certiorari Granted October 14, 1975

TABLE OF CONTENTS

	PAGE
Chronological List of Relevant Docket Entries	1
Complaint	4
Designation Form	15
Affidavit Evidencing Compliance with General Rule 39	16
Motion for a Temporary Restraining Order	17
Memorandum in Support of Plaintiff's Motion for a Temporary Restraining Order	23
Order Denying Motion for a Temporary Restraining Order	37
Appearance	37
Motion in Opposition to the Granting of a Preliminary Injunction	37
Summons and Return	47
Transcript of Proceedings, March 19, 1974	48
Witnesses for the Defendant:	
Leonard Johnson—	
Direct Examination	51
Cross Examination	59
Redirect Examination	78
Recross Examination	80
Al Lundin—	
Direct Examination	82
Cross Examination	91
Redirect Examination	98

William F. Foley—
Direct Examination 99
Cross Examination 102
Redirect Examination 105
Recross Examination 107

Witness for the Plaintiff:

Francis Muscare—
Direct Examination 121
Cross Examination 129

Witness for the Defendant in Rebuttal:

William F. Foley—
Direct Examination 131
Cross Examination 133

Order Denying Motion for Preliminary Injunction 137

Motion for Reconsideration and for Amendment of Judgment Taken Under Advisement 138

Motion for Amendment of Judgment 138

Memorandum in Support of Motion for Reconsideration 139

Findings of Fact and Conclusions of Law, entered orally, March 19, 1974 146

Transcript of Proceedings, March 29, 1974 150

Order Denying Plaintiff's Motion for Reconsideration and for Amendment of Judgment 153

Notice of Appeal 154

Designation of Record on Appeal 154

Plaintiff's Exhibit 1 (Order No. 749) 156

Plaintiff's Exhibit 2 (Order No. 685) 157

Judgment of the United States Court of Appeals Reversing and Remanding to the District Court 167

Order of the United States Court of Appeals Denying Defendant's Petition for Rehearing 167

Order of the United States Court of Appeals Staying Mandate 168

Order of the United States Court of Appeals Recalling Mandate 168

Order of the Supreme Court of the United States Granting Certiorari 169

APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division.

No. 74 C 656

3-11-74—Filed complaint and copy (JS 5) $15.00

3-11-74—Filed Designation

3-11-74—Filed Affidavit regarding rule 39.

3-11-74—Filed Motion for a temporary restraining order.

3-11-74—Filed Memorandum in support of plaintiff's motion for a temporary restraining order.

3-11-74—Motion for a temporary restraining order is denied. Cause continued to March 19, 1974 at 2pm for hearing on preliminary injunction. McGarr, J.

3-19-74—Filed defendant's appearance and that of his attorney.

3-19-74—Filed Motion in opposition to the granting of preliminary injunction.

3-19-74—Cause called for hearing on preliminary injunction. Plaintiff rests on the complaint. Evidence heard for defendant. Defendant rests. Rebuttal evidence heard and concluded. Surrebuttal evidence heard and concluded. Court enters its findings of fact and conclusions of law from the bench. Mo-

tion for preliminary injunction is denied. Cause continued to March 26, 1974 at 10am for status report. McGarr,J.

3-26-74—Motion of Plaintiff for reconsideration and for amendment of judgment is taken under advisement. Cause continued to March 29, 1974 at 10 A.M. for ruling on plaintiffs motion to reconsider previous ruling and further status report.—McGarr,J

3-19-74—Filed summons returned served.

3-26-74—Filed Plaintiff's Motion for Amendment of judgment.

3-26-74—Filed Memorandum in support of plaintiff's motion for reconsideration.

3-29-74 Plaintiffs motion for reconsideration and motion for amendment of judgment, are both denied. Plaintiff's motion for a preliminary injunction will be considered as a motion for a permanent injunction without further hearing and is denied. McGarr,J.

4-4-74—Clerk's file copy of Excerpt of proceedings had on March 19, 1974, before Judge McGarr, filed by an official court reporter." ds

4-26-74—Filed Plaintiff's Notice of appeal. P

5-9-74—"Clerk's file copy of transcript of proceedings had on March 19, 1974 before Judge McGarr, filed by an official court reporter." ds

5-15-74—Filed Plaintiff's Designation for the Complete Record. ds

5-29-74—Filed Plaintiff's Exhibit 1 and 2. (Identified on attached list) Y

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 74-1460

6-7-74—Record on appeal filed.

8-1-74—Appellant's brief and appendix filed.

10-15-74—Appellee's brief filed.

11-15-74—Appellant's reply brief filed.

1-16-75—Oral Argument heard. Cause taken under advisement.

5-21-75—Judgment order entered, reversing and remanding to District Court with directions. Per curiam opinion filed.

6-17-75—Petition for rehearing denied.

6-24-75—Order entered staying mandate until July 24, 1975.

7-31-75—Mandate issued.

8-11-75—Order entered recalling mandate.

IN THE SUPREME COURT OF THE UNITED STATES

No. 75-130

7-24-75—Petition for certiorari filed by defendant.

10-14-75—Order entered granting certiorari.

IN THE UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

FRANCIS MUSCARE,
Plaintiff,

vs.

ROBERT J. QUINN, individually and as Commissioner, Chicago Fire Department,
Defendant.

No. 74C 656
Civil Action

COMPLAINT
(Filed March 11, 1974)

1. This is an action by Plaintiff seeking to enjoin the Chicago Fire Department from continuing his suspension from his duties for alleged violations of §§61.001, 61.006 and 51.133, of the Rules and Regulations of the Chicago Fire Department; for declaratory judgment that §§61.001 and 51.133 are unconstitutional on their face, that §61.006 is unconstitutional as applied to Plaintiff in this case, and that procedures of the Chicago Fire Department under which Plaintiff was suspended are unconstitutional; and for back pay for the period of wrongful suspension.

2. This Court has jurisdiction under 28 U.S.C. §1343, to enforce rights guaranteed by 42 U.S.C. §1983, and under 28 U.S.C. §2201, *et seq.*, and the Constitution of the United States.

3. Defendant Robert J. Quinn is Commissioner of the Chicago Fire Department and exercises sole and exclusive control and management of the Fire Department and its

personnel. [Municipal Code of the City of Chicago, Ch. 12, §4].

4. Plaintiff Francis Muscare has been a member of the Chicago Fire Department since 1955. He currently holds the rank of Lieutenant. Plaintiff wears a small mustache and short goatee. His hair is trimmed to medium length.

5. In December, 1973, Plaintiff's superior officer, Chief Morgan, warned him that he would not be permitted to continue working as a fire fighter unless he shaved his beard off. A few days thereafter Plaintiff was informed that charges had been filed against him with the administration authorities of the Fire Department.

6. Two and one-half months later, on Wednesday, February 27, 1974, at 11:30 A.M., Second Deputy Lattice, Third Division Fire Marshall Callahan and Third Battalion Chief Swoboda entered the fire station where Lt. Muscare was performing his duties as a fire fighter and ordered him to turn in his equipment because he was being suspended effective immediately. Plaintiff was informed that he would receive a letter detailing the charges against him.

7. The appearance of Plaintiff's face and the trim of his hair has remained essentially the same from October, 1973, to the present. Photographs of Plaintiff taken March 1, 1974 and reflecting his appearance since October, 1973 and as of the date of Plaintiff's suspension, are attached hereto as Exhibits "A" and "B" and made a part hereof.

8. On March 4, 1974, Plaintiff received a letter bearing the signature of Walter R. Braun, Chief of Personnel, informing him that he was accused of violating §§61.001, 61.006 and 51.133 of the Chicago Fire Department Rules and Regulations and that his suspension was to last twenty-nine days, beginning February 27, 1974. A copy of the letter from Walter R. Braun is attached hereto as Exhibit "C" and made a part hereof.

9. Section 51.133 of the Rules and Regulations of the Chicago Fire Department provides as follows:

> Section 51.133. Proper Personal Appearance. All members of the Chicago Fire Department shall present a clean and proper appearance in personal care and attire at all times. The face shall be clean-shaven, except that a non-eccentric mustache is permissible. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible.
>
> Sideburns shall be trimmed short and shall be no lower than a line from the middle of the ear.
>
> Hair shall be worn neatly and closely trimmed, and the hair outline shall follow the contour of the ear and slope to the back of the neck. It will be gradually tapered overall, in order to present a neat appearance.

A copy of §51.133 of the Rules and Regulations of the Chicago Fire Department is attached hereto as Exhibit "D" and made a part hereof.

10. Section 61.001 of the Rules and Regulations of the Chicago Fire Department provides as follows:

Part VI
OFFENSES, PROCEDURES, AND PENALTIES IN RESPECT TO VIOLATIONS OF THE RULES AND REGULATIONS, PRACTICES AND PROCEDURES OF THE CHICAGO FIRE DEPARTMENT

• • •

OFFENSES

> Section 61.001. Conduct Unbecoming a Member or Employee of the Chicago Fire Department.

A copy of §61.001 of the Rules and Regulations of the Chicago Fire Department is attached hereto as Exhibit "E" and made a part hereof.

11. Section 61.006 of the Rules and Regulations of the Chicago Fire Department provides as follows:

Part VI
OFFENSES, PROCEDURES, AND PENALTIES IN RESPECT TO VIOLATIONS OF THE RULES AND REGULATIONS, PRACTICES AND PROCEDURES OF THE CHICAGO FIRE DEPARTMENT

• • •

OFFENSES

> Section 61.006. Disobedience of Orders.

A copy of §61.006 of the Rules and Regulations of the Chicago Fire Department is attached hereto as Exhibit "F" and made a part hereof.

12. The twenty-nine day suspension of Plaintiff, a fire fighter of twenty years' service, without any prior notice or opportunity for a hearing, is a violation of Plaintiff's right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

13. Section 51.133 of the Rules and Regulations of the Chicago Fire Department on its face prohibits Plaintiff Muscare from determining the details of his personal appearance and violates Plaintiff's Constitutional rights to personal freedom guaranteed by the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

14. Section 61.001 of the Rules and Regulations of the Chicago Fire Department, creating the offense of "Conduct unbecoming a member or employee of the Chicago Fire Department," is so vague as not to give notice of the conduct it prohibits, depriving Plaintiff of his right to due process under the Fourteenth Amendment to the United States Constitution, and is so overbroad as to infringe upon Plaintiff's Constitutionally protected right to personal freedom.

15. Insofar as §61.006, creating the offense of "Disobedience of Orders," is applied by the Fire Department to punish Plaintiff for the alleged violation of orders issued under §§51.133 and 61.001, such orders were unconstitutional and void, and as applied in this case, §61.006 is unconstitutional.

16. The suspension of Plaintiff has deprived him of his employment and the earnings used to sustain himself and his family, has stigmatized him in his career as a fire fighter and jeopardized his future ability to earn a living in his chosen work. Unless Plaintiff foregoes his Constitutional rights, he will be subject to continued disciplinary actions which will perpetuate the injury. This action of suspending Plaintiff has thus caused and is continuing to cause him to suffer immediate, irreparable injury.

17. If Defendant is enjoined from continuing the suspension or taking any other disciplinary action against Plaintiff for the alleged violations of §51.133, §61.001 and, in this case, for alleged violation of §61.006, Defendant would not be harmed thereby.

Wherefore, Plaintiff respectfully asks this Court:

1. For a declaratory judgment that: (a) §51.133 and §61.001 of the Rules and Regulations of the Chicago Fire Department are unconstitutional on their face and void; and (b) §61.006 of the Rules and Regulations of the Chicago Fire Department is unconstitutional as applied to Plaintiff in this case; and (c) the suspension of Plaintiff without a hearing or an opportunity to defend himself is unconstitutional; and

2. To enjoin Defendant and any of his agents, employees, officers, lawyers, representatives and servants, preliminarily and permanently from enforcing §§61.001 and 51.133, and, insofar as related to orders issued under the aforementioned, §61.006 of the Rules and Regulations of the Chicago Fire Department against Plaintiff by means of suspension from duty or any other means; and

3. For back pay to which Plaintiff would have been entitled if he had not been wrongfully suspended in violation of his rights under the United States Constitution.

/s/ Francis Muscare
Plaintiff
/s/ Robert S. Sugarman
/s/ Linda R. Hirshman
Counsel for Plaintiff

(Affidavit of Francis Muscare).

EXHIBIT "A"

EXHIBIT "B"

EXHIBIT "C"

(Letterhead Of)
Chicago Fire Department
FIRE ACADEMY
February 28, 1974

Lieutenant Frank Muscare
4059 West Barry
Chicago, Illinois 60641

Subject: Suspension

Sir:

You are hereby notified that you have been, or will be, removed from the payroll of the Chicago Fire Department for violations of the Rules and Regulations, Practices and Procedures of the Chicago Fire Department.

Recommended Duration of Suspension: twenty-nine (29) days.

Dates of suspension:
From: 0800 February 27, 1974
To: 0800 March 28, 1974

You are accused of violations of the following sections of the rules:

Sections: 61.001-61.006 and 51.133

1. You will report to the Personnel Department on March 27, 1974 to pick up your badge and other City property assigned to you, and to receive further orders.
2. This suspension does not preclude the filing of these charges against you by the Civil Service Commission. Unless previously notified you will contact the Chief of Personnel on ..... to find out the disposition of your case.

By order of
/s/ Walter R. Braun
Chief of Personnel

cc: 3rd Division Marshal

EXHIBIT "D"

Section 51.131. *Use of Vending Machines in Fire Stations.* The vending machines, dispensing soft drinks and candy, located in fire stations are for the use of Fire Department personnel only. Under no circumstances will other persons be allowed to use the facilities or products dispensed by these vending machines. Cigarette vending machines are not permitted in fire stations.

Section 51.132. *Time Off Due to a Death in the Family.* Time off duty (one work day off) may be granted to all members of the Chicago Fire Department when a death occurs in the immediate family of the member. Immediate family is defined as consisting of mother, father, husband, wife, brother, or sister (including step or half) son or daughter (including step or half) father-in-law, mother-in-law, daughter-in-law, son-in-law, grand parents and grandchildren.

When someone in the "immediate family" dies, the member will notify his immediate superior officer by telephone and give all the pertinent information. The superior officer will then relay the information through the chain of command so that sufficient manpower can be maintained.

Section 51.133. *Proper Personal Appearance.* All members of the Chicago Fire Department shall present a clean and proper appearance in personal care and attire at all times. The face shall be clean-shaven, except that a non-eccentric mustache is permissible. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible.

Sideburns shall be trimmed short and shall be no lower than a line from the middle of the ear.

Hair shall be worn neatly and closely trimmed, and the hair outline shall follow the contour of the ear and slope to the back of the neck. It will be gradually tapered overall, in order to present a neat appearance.

EXHIBITS "E" AND "F"

Part VI.

OFFENSES, PROCEDURES, AND PENALTIES IN RESPECT TO VIOLATIONS OF THE RULES AND REGULATIONS, PRACTICES AND PROCEDURES OF THE CHICAGO FIRE DEPARTMENT

Members or other employees who shall be found guilty of infractions of any of the Rules and Regulations, Practices and Procedures of the Fire Department, shall be subject to the penalties hereinafter enumerated.

OFFENSES

Section 61.000

Section 61.001. Conduct unbecoming a member or employee of the Chicago Fire Department.

Section 61.002. Intoxication.

Section 61.003. Keeping or drinking intoxicating liquors in or about premises of the Fire Department.

Section 61.004. Entering any tavern or bar while on duty, or in uniform, except in the performance of assigned duty.

Section 61.005. Neglect of duty.

Section 61.006. Disobedience of orders.

Section 61.007. Inattention to duty.

Section 61.008. Immoral conduct.

Section 61.009. Making a false official report.

Section 61.010. Reporting for duty while incapable of performing duties without a proper medical reason.

Section 61.011. Absence from duty without permission.

Section 61.012. Leaving a post of duty without being properly relieved or without proper authorization.

Section 61.013. Violation of any law or ordinance.

Section 61.014. Insubordination or disrespect toward a superior officer.

Section 61.015. Using coarse, profane or insolent language or showing disrespect to, or willful maltreatment toward any member of the department or any other person.

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

DESIGNATION FORM—CIVIL

(Filed March 11, 1974)

A. Pending Related Cause, If Any:
Number .....; Judge .....
Reason case deemed related (indicate by (X)):
1. ( ) Involves property included in earlier numbered pending cause.
2. ( ) Involves same issue of fact or grows out of same transaction as earlier numbered pending suit.
3. ( ) Involves validity or infringement of a patent already in suit in earlier numbered pending suit.
4. ( ) Involves both the same issue of law and the same class as a pending suit and is brought as a class action.

B. Indicate Basis Of Jurisdiction By (X):
1. ( ) United States is plaintiff or defendant.
2. (X) Federal question.
3. ( ) Diversity of citizenship.

C. Category Of Case (see reverse side of this form for list of categories):
Civil Rights—Federal Question

D. Is This Suit Brought As A Class Action?
( ) Yes (X) No

• • • • •

/s/ Linda R. Hirshman
Attorney at Law

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

AFFIDAVIT EVIDENCING COMPLIANCE WITH GENERAL RULE 39
(Filed March 11, 1974)

Affiant is the attorney of record for Francis Muscare and has knowledge of the matters covered by this affidavit and has read General Rule 39.

Affiant has not directly or indirectly solicited employment by the above-named party or parties, and knows of no solicitation of said party or parties by any person that has resulted in the employment of the affiant, except (here state all exceptions, or if none state "no exception"): No Exceptions

Affiant has not paid, or promised to pay, and knows of no payment or promise of payment to the above-named party, or parties, of the costs of this case, or of the medical, living of other expenses of any party, or of any part of an attorney's fee, or of any portion of the recovery by suit or settlement herein to any person whatever other than the above-named party or parties and the attorneys of record herein, except (here state all exceptions, or if none state "no exception"): No exceptions

Affiant has filed contemporaneously herewith a signed copy of any written contingent fee agreement applicable to his compensation for representing the above-named party or parties in this action and represents that a signed copy thereof has been furnished to each party whom he represents; if no copy of a contingent fee agreement is filed herewith, affiant represents that his compensation for services in this case is not on a contingent basis.

/s/ Linda R. Hirshman
Affiant

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

MOTION FOR A TEMPORARY RESTRAINING ORDER
(Filed March 11, 1974)

Plaintiff Francis Muscare, by his counsel Robert S. Sugarman and Linda R. Hirshman of Jacobs, Gore, Burns & Sugarman, moves this Court pursuant to Rule 65(b), Federal Rules of Civil Procedure, for a temporary restraining order restraining Defendant in the above captioned case from continuing suspending him under the provisions of §§61.001, 61.006 and 51.133 of the Rules and Regulations of the Chicago Fire Department, for the following reasons:

1. That Plaintiff has filed in this Court a Complaint against the Defendant praying for a declaratory judgment that §§61.001, 61.006 and 51.133 of the Rules and Regulations of the Chicago Fire Department and his suspension under those sections without a hearing and opportunity to defend is unconstitutional and void; a preliminary and permanent injunction against the enforcement of §§61.001, 51.133 and, as applied in this matter, §61.006, of the Rules and Regulations of the Chicago Fire Department, and for back pay for the period of Plaintiff's suspension. The allegations of that Complaint are incorporated herein by reference and made a part hereof.

2. That Defendant has not yet filed his Answer to said Complaint but that, nevertheless, the material allegations of that Complaint are true, and Plaintiff will be able to substantiate the same by sufficient and competent evidence.

3. That the suspension of Plaintiff is causing him immediate and irreparable injury by depriving him of his employment and the earnings used to sustain himself and his

family, stigmatizing him in his career, and jeopardizing his future ability to earn a living as a fire fighter, and if an injunction would be entered as prayed for in the Complaint only after notice upon Defendant and a hearing, Plaintiff will suffer continuing immediate and irreparable injury.

4. That if a temporary restraining order would be entered, Defendant would not be harmed thereby.

Wherefore, Plaintiff requests that a temporary restraining order be entered, without bond, restraining Defendant and any of his agents, employees, officers, lawyers, representatives and services, from suspension of Plaintiff under the provisions of §61.001 and §51.133, and, insofar as related to orders issued under the aforementioned, §61.006 of the Rules and Regulations of the Chicago Fire Department and from taking any disciplinary action against him, pending further order by this Court; and for such other and further relief as this Court may deem just.

Respectfully submitted,
/s/ Robert S. Sugarman
/s/ Linda R. Hirshman
Counsel for Plaintiff

State Of Illinois
County Of Cook—ss.

AFFIDAVIT

Affiant Francis Muscare, being first duly sworn on oath, deposes and states as follows:

1. He has been a member of the Chicago Fire Department since 1955, currently holding the rank of Lieutenant.

2. He has worn a small mustache, a short goatee, and hair trimmed to medium length, as he presently appears, since October, 1973.

3. In December, 1973, his superior officer, Chief Morgan, instructed him to shave his goatee off and, when he declined to do so, was shortly thereafter informed that charges had been filed against him with the administration of the Chicago Fire Department.

4. On February 27, 1974, while he was performing his duties as a fire fighter, Second Deputy Lattice, Third Division Fire Marshall Callahan and Third Battalion Chief Swoboda of the Chicago Fire Department ordered him to turn in his fire equipment and leave the fire station where he was on duty, because he was being suspended from duty as a fire fighter, effective immediately.

5. On March 4, 1974, he received a letter signed by Walter R. Braun, Chief of Personnel, informing him that he was being suspended from duty until March 28, 1974 for alleged violation of §§61.001, 61.006 and 51.133 of the Rules and Regulations of the Chicago Fire Department. A copy of said letter is hereto attached as Exhibit "A" and made a part hereof. Copies of §61.001, §61.006 and §51.133 of the Rules and Regulations of the Chicago Fire Department are hereto attached as Exhibits "B", "C," and "D," respectively and made a part hereof.

6. Affiant was afforded no hearing or opportunity to defend himself before his suspension.

7. Affiant is currently being deprived of the earnings used to sustain himself and his family, the opportunity to perform his duties as a fire fighter with the Chicago Fire Department, and present and future ability to pursue his chosen career.

8. This action by the Defendant suspending Affiant from his position as a fire fighter with the Chicago Fire Department is causing Affiant to suffer, and will continue to cause immediate, irreparable injury to the Affiant.

Further Affiant Sayeth Not.

/s/ Francis Muscare

EXHIBIT "A"

(Letterhead Of)
Chicago Fire Department
FIRE ACADEMY

February 28, 1974

Lieutenant Frank Muscare
4059 West Barry
Chicago, Illinois 60641

Subject: Suspension

Sir:

You are hereby notified that you have been, or will be, removed from the payroll of the Chicago Fire Department for violations of the Rules and Regulations, Practices and Procedures of the Chicago Fire Department.

Recommended Duration of Suspension: twenty-nine (29) days.

Dates of suspension:

From: 0800 February 27, 1974
To: 0800 March 28, 1974

You are accused of violations of the following sections of the rules:

Sections: 61.001-61.006 and 51.133

1. You will report to the Personnel Department on March 27, 1974 to pick up your badge and other City property assigned to you, and to receive further orders.
2. This suspension does not preclude the filing of these charges against you by the Civil Service Commission. Unless previously notified you will contact the Chief of Personnel on ..... to find out the disposition of your case.

By order of
/s/ Walter R. Braun
Chief of Personnel

cc: 3rd Division Marshal

EXHIBITS "B" AND "C"

Part VI.

OFFENSES, PROCEDURES, AND PENALTIES IN RESPECT TO VIOLATIONS OF THE RULES AND REGULATIONS, PRACTICES AND PROCEDURES OF THE CHICAGO FIRE DEPARTMENT

Members or other employees who shall be found guilty of infractions of any of the Rules and Regulations, Practices and Procedures of the Fire Department, shall be subject to the penalties hereinafter enumerated.

OFFENSES

Section 61.000

Section 61.001. Conduct unbecoming a member or employee of the Chicago Fire Department.

Section 61.002. Intoxication.

Section 61.003. Keeping or drinking intoxicating liquors in or about premises of the Fire Department.

Section 61.004. Entering any tavern or bar while on duty, or in uniform, except in the performance of assigned duty.

Section 61.005. Neglect of duty.

Section 61.006. Disobedience of orders.

Section 61.007. Inattention to duty.

Section 61.008. Immoral conduct.

Section 61.009. Making a false official report.

Section 61.010. Reporting for duty while incapable of performing duties without a proper medical reason.

Section 61.011. Absence from duty without permission.

Section 61.012. Leaving a post of duty without being properly relieved or without proper authorization.

Section 61.013. Violation of any law or ordinance.

Section 61.014. Insubordination or disrespect toward a superior officer.

Section 61.015. Using coarse, profane or insolent language or showing disrespect to, or willful maltreatment toward any member of the department or any other person.

EXHIBIT "D"

Section 51.131. *Use of Vending Machines in Fire Stations.* The vending machines, dispensing soft drinks and candy, located in fire stations are for the use of Fire Department personnel only. Under no circumstances will other persons be allowed to use the facilities or products dispensed by these vending machines. Cigarette vending machines are not permitted in fire stations.

Section 51.132. *Time Off Due to a Death in the Family.* Time off duty (one work day off) may be granted to all members of the Chicago Fire Department when a death occurs in the immediate family of the member. Immediate family is defined as consisting of mother, father, husband, wife, brother, or sister (including step or half) son or daughter (including step or half) father-in-law, mother-in-law, daughter-in-law, son-in-law, grand parents and grandchildren.

When someone in the "immediate family" dies, the member will notify his immediate superior officer by telephone and give all the pertinent information. The superior officer will then relay the information through the chain of command so that sufficient manpower can be maintained.

Section 51.133. *Proper Personal Appearance.* All members of the Chicago Fire Department shall present a clean and proper appearance in personal care and attire at all times. The face shall be clean-shaven, except that a non-eccentric mustache is permissible. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible.

Sideburns shall be trimmed short and shall be no lower than a line from the middle of the ear.

Hair shall be worn neatly and closely trimmed, and the hair outline shall follow the contour of the ear and slope to the back of the neck. It will be gradually tapered overall, in order to present a neat appearance.

CERTIFICATE OF ATTORNEY

I, Linda R. Hirshman, one of the attorneys for Plaintiff Francis Muscare, Do Hereby Certify that on March 11, 1974, I attempted to give notice of this motion for a temporary restraining order to the named Defendant by telephoning him and the Corporation Counsel of the City of Chicago personally at their official places of business and advising them of the filing of this motion.

/s/ Linda R. Hirshman
Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

(Filed March 11, 1974)

I.

FACTS

Plaintiff in this action, Francis Muscare, has been a fire fighter with the Chicago Fire Department since 1955. On February 27, 1974, while Plaintiff was performing his duties as a fire fighter at his fire station, three of his superior officers, Second Deputy Lattice, Third Division Fire Marshall Callahan, and Third Battalion Chief Swoboda, presented themselves at Plaintiff's station and informed him that he was being suspended as of that moment, to turn in his equipment and identification. On Monday, March 4, 1974, Lieutenant Muscare received a letter signed by Walter R. Braun, Chief of Personnel, informing him that

he was being suspended for a period of twenty-nine days from February 27, 1974, for alleged violations of §§61.001, 61.006 and 51.133 of the Rules and Regulations of the Chicago Fire Department.

Section 51.133 of the Rules and Regulations of the Chicage Fire Department provides:

> Section 51.133. Proper Personal Appearance.
> All members of the Chicago Fire Department shall present a clean and proper appearance in personal care and attire at all times. The face shall be clean-shaven, except that a non-eccentric mustache is permissible. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible.
> Sideburns shall be trimmed short and shall be no lower than a line from the middle of the ear.
> Hair shall be worn neatly and closely trimmed, and the hair outline shall follow the contour of the ear and slope to the back of the neck. It will be gradually tapered overall in order to present a neat appearance.

Section 61.001 of the Rules and Regulations of the Chicago Fire Department creates the offense of "conduct unbecoming a member or employee of the Chicago Fire Department" and Section 61.006 of the Rules and Regulations of the Chicago Fire Department creates the offense of "disobedience of orders."

Since October, 1973, Lt. Muscare has worn a small mustache and a short, neatly-trimmed goatee. His hair is medium in length. Plaintiff's facial appearance and the length of his hair has remained essentially the same from October, 1973 to the present. In December, 1973, one of Lt. Muscare's superior officers, Chief Morgan, informed him that he could not work with a goatee and shortly thereafter, Morgan advised Plaintiff that charges had been filed against him. However, it was not until February 27, 1974 that any further action was taken against him.

Lt. Muscare was then suspended from duty without pay, with the prospect of further disciplinary action if he did not conform his personal appearance to the dictates of the Chicago Fire Department.

Plaintiff has been and is continuing to be deprived of his income, his chosen work, and his reputation as a fire fighter by a summary procedure of the Chicago Fire Department enforcing regulations which infringe upon his Constitutional right to determine his personal appearance as he chooses, and the suspension of Lt. Muscare can only be conceived as an initial step in long-range disciplinary measures aimed at forcing him to conform his appearance to the dictates of the administration of the Chicago Fire Department.

II.

JURISDICTION

This Court has jurisdiction to redress the deprivation of Plaintiff's Constitutional rights protected by 42 U.S.C. §1983, under 28 U.S.C. §1343 and 28 U.S.C. §2201, *et seq.* The Court also has jurisdiction over actions arising directly under the United States Constitution itself. *Bell* v. *Hood,* 327 U.S. 678, 66 S.Ct. 773 (1946).

III.

ARGUMENT

A. Section 51.133 of the Rules and Regulations of the Chicago Fire Department is an Unconstitutional Deprivation of Plaintiff's Right to Determine His Personal Appearance.

Plaintiff's right to determine the details of his personal appearance free from arbitrary governmental interference is protected by the United States Constitution. The Fire Department may not condition Plaintiff's employment upon

the requirement that he yield up this right. The United States Court of Appeals for the Seventh Circuit specifically set out the Constitutional protections for the right to determine one's appearance, particularly with regard to length of hair, in *Breen* v. *Kahl,* 419 F.2d 1034 (7 Cir. 1969):

> The right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution . . . whether this right is designated as within the 'penumbras' of the First Amendment freedom of speech, see *Griswold* v. *Connecticut,* 331 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), or as encompassed within the Ninth Amendment as an 'additional fundamental right . . . which exists alongside those fundamental rights specifically mentioned in the first eight constitutional Amendments" [cite *Griswold*], it clearly exists and is applicable to the states through the due process clause of the Fourteenth Amendment.
> [419 F.2d at 1037].

In light of the Constitutional protections for this self-determination, the Court of Appeals struck down as unconstitutional a high school regulation prescribing the length and appearance of hair for male students. Since the decision in *Breen* v. *Kahl,* both the Court of Appeals and the District Court have consistently reiterated their commitment to protect the right of the individual to decide what the length and style of his hair will be. *Arnold* v. *Carpenter,* 459 F.2d 939 (7 Cir. 1972), *Crews* v. *Cloncs,* 432 F.2d 1259 (7 Cir. 1970), *Copeland* v. *Hawkins,* 352 F.Supp. 1022 (E.D.Ill., 1973).

The Constitutional protection of freedom to determine one's personal appearance protects public employees from the enforcement of officially imposed standards. Absent the showing of a compelling governmental interest of the most serious nature, public employers may not dictate to their employees the way in which they must groom themselves:

> It is now clearly established that the State does not possess an absolute right arbitrarily to refuse opportunities such as . . . employment in public service . . . [*Crews* v. *Cloncs,* 432 F.2d at 1263, *supra*].

This protection was specifically applied to a fireman in 1971, in *Hunt* v. *Board of Fire Commissioners of Massapequa Fire District,* 327 N.Y.S.2d 36 (Sup.Ct. 1971), where the New York Court struck down a fireman's suspension for violation of a grooming regulation, holding:

> "there is as a matter of substantive due process a constitutional right to determine one's own hair style and . . . the burden is upon the Board to show substantial justification for the regulation it seeks to impose.
> [327 N.Y.S. at 45].

Similarly, in the case of *Lindquist* v. *City of Coral Gables,* 323 F.Supp. 1161 (S.D.Fla. 1971), the Federal District Court for the Southern District of Florida ordered the Coral Gables Fire Department to reinstate with back pay a fireman who had been suspended for violation of hair regulations substantially similar to the ones involved in the case at hand. Recently, in *Black* v. *Rizzo,* 360 F.Supp. 648 (E.D. Pa. 1973) the District Court for the Eastern District of Pennsylvania reiterated a fireman's right to determine his personal appearance despite regulations almost identical to those of the Chicago Fire Department and reinstated the fireman with back pay. The Pennsylvania District Court, after a survey of the substantial body of law that has evolved around this subject, concluded that:

> Among other things, the plaintiff has argued that his interest in wearing his hair in a style, manner, and length of his choosing constitutes a Constitutional right implicitly protected by the "liberty" assurance of the Due Process Clause of the Fourteenth Amendment [cites] . . . The Court is satisfied that the plaintiff has demonstrated the existence of such a constitutionally protected interest.
> [360 F.Supp. at 651].

The Court in *Black* v. *Rizzo* definitively rejected the argument that interference with that right could be justified on grounds of a fire department's disciplinary interest in regulating the activities of its members. The United States Court of Appeals for the Second Circuit recently ruled that even the unique public function of a Department of Police does not justify the interference with a policeman's right to determine his personal appearance, specifically with regard to the style of his hair. *Dwen* v. *Barry,* 483 F.2d 1126 (2 Cir. 1973).

Section 51.133 of the Rules and Regulations of the Chicago Fire Department reveals its constitutional infirmity on its face. Without setting forth any reason for the rule, the Fire Department has simply created a requirement that its members present a "proper appearance in personal care and attire." The standards of §51.133, including, for example, "non-eccentric mustaches" can only be based on some administrative officer's subjective aesthetic preference. This patent attempt to impose the personal preferences of administration of the Chicago Fire Department upon the members of the Department is a violation of the members' Constitutional rights and cannot be sustained. Such official attempts to dictate the details of personal appearance have been prohibited again and again by the United States District Courts and Courts of Appeals, including the Court of Appeals for the Seventh Circuit. This attempt once again to impose an official standard of appearance is directly counter to what is now a well-settled body of case law. There can be no doubt that Plaintiff will ultimately prevail on the merits of his claim, and the injury he is now suffering for his exercise of his clear Constitutional rights is illegal, irreparable and unjustifiable.

B. Continued Suspension of Plaintiff and the Likelihood of Additional Action Against Him is Causing and Will Cause Additional Immediate, Irreparable Injury to Plaintiff, and Restraint of Plaintiff's Suspension will not Harm Defendant.

By action of the Chicago Fire Department on February 27, 1974, Lt. Francis Muscare was summarily ordered off the premises of his employment and suspended from active service with the Chicago Fire Department. Under the terms of his suspension, as described in the Fire Department's letter of February 28, 1974, Lt. Muscare can only anticipate further disciplinary action being taken against him if he continues to exercise his Constitutional rights in violation of the Rules and Regulations of the Chicago Fire Department dictating the details of his personal appearance. By its action suspending Lt. Muscare, the Chicago Fire Department has deprived and is continuing to deprive him of the earnings currently used to support himself and his family, the opportunity to pursue his career as a fire fighter, his reputation in the community, and his prospects for future successful pursuit of his chosen career. Plaintiff is thus suffering extensive, immediate, ongoing, irreparable injury every day that he remains excluded from the fulfillment of his chosen work, and he has no reasonable anticipation that the penalties currently being imposed upon him will be mitigated in the future unless he yields his Constitutional rights to the Fire Department. Unless this Court acts to remedy Plaintiff's position immediately, he will be irreparably injured.

Lt. Muscare has been performing as a fire fighter with his personal appearance essentially the same as it is at this moment since at least October, 1973. Nothing in the Rules and Regulations of the Chicago Fire Department indicates that any harm would come to the Department if he were to continue to do so. By contrast to the injury which Lt. Muscare has suffered and is continuing to suffer, his rein-

statement as a fire fighter will not harm Defendant in any substantial manner. Indeed, unless the Chicago Fire Department is employing superfluous fire fighters, one must assume that Lt. Muscare's suspension for twenty-nine days, if anything, actually harms the Fire Department by depriving them of a qualified and experienced fire fighter, for no substantial reason. Since the Chicago Fire Department had been aware of Lt. Muscare's appearance since at least last December, it is inconceivable that his appearance created a crisis of such urgent nature to warrant action against him without any of the Constitutionally required procedures for action against him.

C. Section 61.001 of the Rules and Regulations of the Chicago Fire Department is Unconstitutionally Vague and Overbroad.

Section 61.001 of the Rules and Regulations of the Chicago Fire Department creates an offense denominated "Conduct unbecoming a member or employee of the Chicago Fire Department." This prohibition is so general as to be incapable of a reasoned interpretation in advance of its application. Further, the wide scope of activities which may be interpreted as "conduct unbecoming" a fire fighter encompasses both Constitutionally protected activities and those which may be beyond such protections, and thus the regulation contains the potential for infringement upon Constitutional rights. Such sweeping regulations are a violation of Constitutional standards and must be replaced by more narrowly drawn rules. *Shelton* v. *Tucker,* 364 U.S. 479 (1960).

Absent any definition of conduct unbecoming a member of the Chicago Fire Department, §61.001 is simply what the administrators of the Fire Department say it will be in any given case. The person unfortunate enough to come

within the purview of this section cannot predict what his offenses may be. Such a rule violates the very fundamentals of due process of law and chills the exercise of Constitutionally protected rights.

In *Soglin* v. *Kauffman,* 418 F.2d 163 (7 Cir. 1969), the United States Court of Appeals for the Seventh Circuit ruled that a university could not undertake disciplinary proceedings for violation of a rule proscribing "misconduct" on the grounds that such proceedings were not based on "standards of conduct expressed in reasonably clear and narrow rules." [418 F.2d at 167] The Court stated:

> The use of 'misconduct' as a standard in imposing the penalties threatened here must therefore fall for vagueness. The inadequacy of the rule is apparent on its face. It contains no clues which could assist a student, an administrator or a reviewing judge in determining whether conduct not transgressing statutes is susceptible to punishment by the University as 'misconduct'.

Here, also the inadequacy of §61.001 is apparent on its face. The impossibility of predicting what administrators will determine to be "conduct unbecoming" is obvious. The members and employees of the Chicago Fire Department may not be forced to guess at what behavior will bring the penalty of suspension or other discipline upon them any more than any other citizen must be forced to guess at what behavior will provoke the wrath of an unpredictable government. The Constitutional infirmity of §61.001 is particularly offensive because as in the instant case it can be interpreted to prohibit conduct protected by the Constitution.

Even the military are restrained from ordering their internal affairs through means such as sweeping and vague regulations. In *Avrech* v. *Secretary of Navy,* 477 F.2d 1237 (D.C. Cir. 1973), the United States Court of Appeals for

the District of Columbia Circuit struck down as unconstitutional a conviction under Article 134 of the Uniform Code of Military Justice which provided:

> All disorders and neglect to the prejudice of good order and discipline in the Armed Forces, all conduct of a nature to bring discredit upon the Armed Forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court martial, according to the nature and degree of the offense and shall be punished at the discretion of that court.
> [477 F.2d 1237 at 1239].

See also: *Levy* v. *Parker,* 478 F.2d 772 (3 Cir. 1973). The Court ruled that such a broad-brush prohibition fell far short of the Constitutional requirements of fair warning to the accused and an ascertainable standard for the judge. Certainly, the Chicago Fire Department does not have a freer hand in constructing its disciplinary system than the United States Armed Forces. Section 61.001 of the Rules and Regulations of the Chicago Fire Department does not approach the Constitutional requirements of due process of law.

D. The Summary Suspension of Plaintiff Violates His Constitutional Right to Due Process of Law.

The suspension of Lt. Muscare was carried out by means of a verbal pronouncement from three of his superior officers in the Fire Department and a one-page letter from the Chief of Personnel informing him that he was "accused of" violating certain sections of the Rules and Regulations of the Chicago Fire Department. Plaintiff's suspension became effective immediately after the three superior officers entered his fire station on February 27, 1974. Plaintiff was afforded no opportunity to make a case on his own

behalf before the penalty of suspension was imposed upon him.[1]

It is well settled that the public employees have rights in their employment which cannot be taken away without procedural due process. *Slochower* v. *Board of Higher Education of the City of New York,* 350 U.S. 551, 76 S.Ct. 637 (1956). *Perry* v. *Sinderman,* 408 U.S. 593, 92 S.Ct. 2694 (1972).[2] The protections of procedural due process apply whether the penalty being imposed amounts to a permanent discharge or a suspension from whatever public property right is involved. *Snead* v. *Department of Social Services, City of New York,* 355 F.Supp. 764 (S.D.N.Y. 1973), *Soglin* v. *Kauffman, supra.*

In *Hostrop* v. *Board of Junior College District No. 515, Counties of Cook and Will, and State of Illinois,* 471 F. 2d 488 (7 Cir. 1973), the United States Court of Appeals for the Seventh Circuit set forth the procedure which must be followed in order to afford a public employee elementary due process:

> We find that the resolution of these interests requires that Plaintiff be given a notice of the charges against him, notice of the evidence upon which the charges will

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1 It is plain that this initial suspension is merely a prelude to additional disciplinary action against Plaintiff unless he conforms to the administration's views of "proper personal appearance."

2 The protections against being deprived of life, liberty or property without due process of law are so fundamental to the American system of ordered liberty that the requirements of elementary procedural due process has been imposed in cases involving a wide range of interests including, for example, the right to a hearing before consumer goods may be summarily repossessed, *Fuentes* v. *Schevin,* 407 U.S. 67, 92 S. Ct. 1983 (1972) or welfare benefits cut off, *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S. Ct. 1011 (1970).

be based, a hearing before a tribunal possessing apparent impartiality, and a chance to present witnesses and confront adverse evidence at the hearing.
[471 F.2d 488 at 495].

Further, these procedures must be made available to the government employee prior to the action against him. As the United States Court of Claims pointed out in *Ricucci* v. *United States,* 425 F.2d 1252, (Ct. Cl. 1970):

> Few of them [government employees] earn more than enough to pay their living expenses from month to month, and when their salaries are cut off, they may be in the same destitute circumstances as a welfare recipient whose aid has been discontinued.
> [425 F. 2d 1252 at 1256].

Just as a welfare recipient may not be cut off from the basic necessities of life without a hearing prior to the action, *Goldberg* v. *Kelly, supra,* or a citizen deprived of his everyday consumer goods without judicial process, *Fuentes* v. *Schevin, supra,* and *Sniadach* v. *Family Finance Corporation,* 395 U.S. 337, 89 S.Ct. 1820 (1969), this Court should not permit a fire fighter with civil service status and twenty years' service with the Department to be summarily suspended without prior opportunity to meet the charges against him and present any kind of defense. Only the most serious type of emergency would justify the procedure used to suspend Lt. Muscare. The present case is hardly such an instance, where the Fire Department utilized the services of Lt. Muscare for a period of over two months from the time he was initially reprimanded for wearing a goatee. The manner in which Lt. Muscare was involuntarily suspended from his employment only illustrates the abuses which the right to due process is designed to avoid.

E. As Applied to Plaintiff in this Case, §61.006 of the Rules and Regulations of the Chicago Fire Department is Unconstitutional.

Under §61.006, Plaintiff is being punished for failure to obey orders which infringe upon his Constitutional rights to personal freedom and due process of law. Just as the Fire Department was exceeding its powers by ordering Plaintiff to shave his goatee and thus forego his Constitutional rights under §51.133 and §61.001, Rules and Regulations, Chicago Fire Department, they cannot now punish Plaintiff for failing to obey an unconstitutional order, accomplishing by indirection what they could not do directly. The Court in *Hunt* v. *Board of Fire Commissioners, supra,* drew this obvious conclusion from its ruling that the Fire Department had no right to dictate its members' appearance:

> It follows that John Hunt's promise to obey the department rules must be read as requiring only that he comply with rules not in violation of his constitutional rights and not as a waiver of such rights.
> [327 N.Y.S. 2nd 36 at 41].

Or, as the Seventh Circuit recently affirmed in *C.O.P.* v. *Conlisk,* ..... F.2d ..... (7 Cir. 1973):

> The district court held that Rules 2, 5, and 6 were unconstitutional as applied in this case. We agree with this determination. Rules 2, 5, and 6 were used only in conjunction with Rule 51 in discharging the six policemen. The underlying 'violation' in each case was the exercise of the privilege against self-incrimination before the grand jury, which was prohibited by Rule 51. Since we have found Rule 51 to be constitutionally invalid insofar as it denies the Fifth Amendment right to a public employee where there is a possibility of criminal prosecution, the use of Rules 2, 5, and 6 in conjunction with Rule 51 in such a circumstance was also invalid.

IV.

CONCLUSION

Since February 27, 1974, Lt. Francis Muscare, a fire fighter who has devoted twenty years to the service of the City of Chicago Fire Department, has been separated from his employment, with accompanying loss of income, job opportunities, and reputation in the community. He has been thus penalized for attempting to exercise his Constitutional right to determine his personal appearance. The penalty of suspension, with accompanying further penalties if Plaintiff does not forego his Constitutional rights, was imposed upon him without even a semblance of the procedures required by due process of law. By virtue of his suspension from the Chicago Fire Department, Plaintiff has been and is continuing to be, subjected to irreparable injury. Plaintiff is thus being deprived of his Constitutional rights in the most immediate, irreparable manner and for no justifiable governmental reason. Only immediate action by this Court can terminate the imposition of this injury on Plaintiff.

Respectfully submitted,
/s/ Robert S. Sugarman
/s/ Linda R. Hirshman
Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

Name of Presiding Judge, Honorable Frank J. McGarr
Cause No. 74C 656 Date Mar. 11, 1974
Title of Cause—Francis Muscare v. Robert J. Quinn, individually and as Commissioner, Chicago Fire Department

Brief Statement of Motion—Shall move the Court for a temporary restraining order
Names and Addresses of moving counsel—Linda R. Hirshman of Jacobs, Gore, Burns & Sugarman, 201 North Wells, Suite 2122, Chicago, Illinois 60606
Representing—Plaintiff

Motion for a temporary restraining order is denied. Cause continued to Mar. 19, 1974 at 2:00 P.M. for hearing on preliminary injunction. McGarr, J.

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

APPEARANCE

(Filed March 19, 1974)

I enter my Appearance as Attorney for said Robert J. Quinn.
Dated: 2-19, 1974

/s/ Richard L. Curry
Corporation Counsel
City Of Chicago
/s/ R. L. Curry by
/s/ Philip M. Sheridan
Asst. Corp. Counsel

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

MOTION IN OPPOSITION TO THE GRANTING OF PRELIMINARY INJUNCTION

(Filed March 19, 1974)

Now comes the Defendant, Robert J. Quinn, Commissioner, Chicago Fire Department, by his attorney, Richard

L. Curry, Corporation Counsel of the City of Chicago, and moves this Honorable Court to deny plaintiff's prayer for a Preliminary Injunction and in support thereof states as follows:

1. The plaintiff has failed to show that without such relief he would be irreparably damaged. The so-called irreparable injury that is alleged by plaintiff amounts to no more than the suspension on his record and loss of salary incurred as the result of the 29 day suspension. Even if this Court were to find that he had been illegally "injured", nevertheless, such injury is not irreparable. Economic injury, loss of income or employment does not entitle an individual to injunctive relief. The plaintiff is not injured in any manner that could not be readily rectified if he is successful on the merits. For reasons that the defendant will show at this hearing, the defendant submits that it would not be in the public interest to issue a Preliminary Injunction.

The burden is clearly upon the parties requesting temporary or preliminary injunctive relief to demonstrate that they are entitled to such relief. *Crowther* v. *Seaborg,* (CA 10th, 1969) 415 F.2d 437; *Weber* v. *Continental Motors Corp.,* (S.D.N.Y. 1969) 365 F.Supp. 404. It is also settled that the granting of a temporary or preliminary injunction is a matter of Judicial discretion. The propriety of its issuance depends on the circumstances of a particular case. *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 316 U.S. 4 (1942). Courts consider the effect their actions might have on the public interest prior to issuing injunctive relief, see *Yakus* v. *U. S.,* 321 U.S. 414; *Snively Groves* v. *Florida Citrus Commission,* D. C. Fla. 1938, 23 F.Supp. 600.

2. There has been no prima facie showing by the plaintiff of reasonable probability that he will prevail on the merits of the case.

It would appear the Federal Courts in the various circuits are divided about equally with respect to the constitutional right of a student to choose the length of his hair. See footnote 5 in *Arnold* v. *Carpenter,* 459 F.2d 939 (7th Cir. 1972) cited by plaintiff and *New Rider* v. *Board of Education of Indiana School District No. 1, Okl.,* 480 F.2d 693 (10th Cir. 1973). These student-hair cases are not, however, controlling in the case before this Court.

The salient issue before this Honorable Court is whether or not the Chicago Fire Department was justified in suspending plaintiff, a Lieutenant in the Chicago Fire Department, because of his refusal to shave off his beard. The factual situation in the case at bar is very similar to that presented in the case of *Yarbrough* v. *City of Jackson,* 363 F.Supp. 1176 (M.D. Fla. 1973). The Fire Department in that city had a grooming regulation with respect to the prohibition of beards and limitations with respect to the type of mustaches and length of hair that could be worn by firemen similar to Section 51.133 of the Rules and Regulations of the Chicago Fire Department. The plaintiff therein was discharged from his employment for refusing to obey an order by a Fire Chief to trim his hair. The plaintiff therein filed suit alleging an illegal infringement upon the constitutionally protected rights of freedom of expression of firemen.

The Court granted judgment to the City of Jackson for two reasons. The first reason was that the Court was unwilling to interfere with the reasonable conclusions of the responsible officers in the Fire Department that there was a rational relationship between longer hair and per-

sonal safety of its firemen (longer hair more prone to catch on fire, interference with seal of gas mask). The second basis for the decision of the Court was its "firm conviction that it is not the function of the judiciary to interfere with a fire chief's reasonable notion as to what is necessary to maintain discipline within a 'quasi military' organization for which he is responsible and which is dedicated to the protection of the public and its property" (p. 1179). With respect to the second basis of its decision the Court noted it was following the case of *Stradley* v. *Anderson,* 478 F. 2d 188 (8th Cir. 1973), rather than the case of *Owen* v. *Barry,* 483 F. 2d 1126 (2nd Cir. 1973), because it felt "there is a rational relationship between discipline among firefighters and public safety and that it is not the province of this Court to dictate its own philosophy as to the best method to promote discipline" (p. 1181).

The recent Illinois case of *Hordorwich* v. *Board of Police and Fire Commissioners of Melrose Park,* ..... Ill. App. 3rd. ..... (No. 58652—Copy of Opinion attached), sustained the discharge of a fireman who refused to follow a hair regulation and refused a direct order to obtain a haircut. After noting that the evidence substantiated that sideburns interfered with the use of a smoke mask the Court stated —"Personal rights must be reasonably limited when the safety of firemen and others is involved."

On January 4, 1974, the Supreme Court of New Jersey sustained in an Abstract Opinion (64 N.J. 142) the decision of the Superior Court of New Jersey in the case of *Manco* v. *Town of Irvington,* 126 N.J. Super. 148 (1973). The fireman therein had been suspended for violating a directive of his department requiring him to have short hair and a clean face so that a good face seal could be obtained on face masks used in fighting fires.

The defendant respectfully submits that the defendant acted properly and was justified in suspending the plaintiff for his having the beard and his refusal to obey a direct order to shave off his beard.

3. Plaintiff has failed to exhaust the State Administrative and Judicial remedies available to him. *Slayton* v. *Smith,* 404 U.S. 53 (1971), Section 10-1-18 of Chapter 24 of the Illinois Revised Statutes, 1971, provides no civil service employee shall be suspended for over 30 days except for cause upon written charges and after an opportunity to be heard in his own defense by the Civil Service Commission. This Section also grants those in charge with the administration of a department the power to suspend an employee for 30 days or less and grants to said employee the right to have a hearing before the Civil Service Commission concerning the propriety of that suspension if said suspension was for more than 5 days or incurred within 6 months of a previous suspension regardless of the length of said suspension.

In *Elko* v. *McCarey,* 315 F. Supp. 886 (E.D. Pa. 1970), the Court refused to proceed on a case where a fireman was suspended for violating a hair regulation and allegedly threatened with additional disciplinary sanctions because the Court felt that there was no immediate irreparable injury that could not be redressed by the utilization of available administrative remedies and judicial review provided for by city civil service regulations. The factual situations before the Court would appear to be substantially the same.

Wherefore, the Defendant, Robert J. Quinn, Individually and as Commissioner, Chicago Fire Department, prays that this Honorable Court deny the request for a Preliminary

Injunction and for such other relief as this Honorable Court may deem meet and just.

Richard L. Curry, Corporation Counsel
of the City of Chicago,
Attorney for Defendant,
Robert J. Quinn, Individually and as Commissioner, Chicago Fire Department,
By: /s/ Philip M. Sheridan
Assistant Corporation Counsel

State Of Illinois
County Of Cook—ss

AFFIDAVIT

Philip M. Sheridan, being first duly sworn on oath, deposes and says that he is an Assistant Corporation Counsel and in said capacity has been assigned to this cause; that he has read the foregoing Motion by him subscribed and that the same is believed to be well founded and that any facts contained therein are correct and true to the best of his knowledge and belief.

/s/ Philip M. Sheridan
Assistant Corporation Counsel

Subscribed And Sworn To
Before Me This 19th Day
Of March, A.D., 1974.

/s/ Barbara E. Hanses
Notary Public
(Seal)

58652

Peter Hordorwich,
Plaintiff-Appellant,
v.
Board Of Police And Fire Commissioners Of Melrose Park, et al.,
Defendants-Appellees.

Appeal From
Circuit Court,
Cook Countv.
Hon.
Edward F. Healy,
Presiding.

Mr. Justice Dieringer delivered the opinion of the court:

This is an appeal from a judgment entered by the Circuit Court of Cook County sustaining the plaintiff's discharge by the Board of Police and Fire Commissioners of the Village of Melrose Park.

The issues presented on appeal are (1) whether the findings and decision of the Board of Police and Fire Commissioners of Melrose Park were based upon cause and supported by substantial evidence; (2) whether the Board's denial of plaintiff's motion for continuance constituted prejudicial error and deprived the plaintiff of a fair hearing; and (3) whether the findings of the Board were adequate to support the decision of the Board.

The plaintiff, Peter Hordorwich, became a fireman for the Village of Melrose Park in 1967. On March 15, 1971, Fire Chief Anthony Zito posted a General Order which directed all Melrose Park firemen to be clean shaven and to have their hair cut in conformity with an attached drawing of a human head. In December, 1971, Chief Zito suspended the plaintiff from duty for his failure to comply with the General Order and insubordination in disobeying a direct order to obtain a haircut. Chief Zito also filed charges with the Board of Police and Fire Commissioners of the Village of Melrose Park asking for plaintiff's dis-

charge. A hearing on the charges was held on January 21, 1972. At the hearing counsel for plaintiff requested a continuance for the reason that he was not yet adequately prepared for trial. The motion was denied by the Board. On February 28, 1972, the Board found that cause existed for the discharge of the plaintiff from his position as fireman in that he "was not clean shaven nor did he have a length of hair so as to be able to perform all of his duties required as a fireman . . . [and in that he was] . . . guilty of insubordination in that on December 21, 1971, he did violate a direct order of the Chief of the Fire Department of the Village of Melrose Park to get a hair cut that would place him within the purview of the General Order of March 15, 1971," and he was thereupon discharged. He filed suit in the Circuit Court of Cook County and on November 17, 1972, a hearing was held on the plaintiff's amended complaint in administrative review. At the close of the hearing the court sustained and affirmed the Board's decision to discharge the plaintiff.

The plaintiff's first contention is the findings and decision of the Board of Police and Fire Commissioners of Melrose Park were neither based upon cause nor supported by substantial evidence. The plaintiff argues the Board's finding plaintiff was "unfit for duty by reason of his long hair" was insufficient. He relies on the decision in *Gigger* v. *Board of Fire and Police Commissioners,* (1960) 23 Ill. App. 2d 433, wherein the Appellate Court held it is imperative the record of an administrative hearing show that an impartial inquiry into the facts was conducted.

We believe the findings and decision of the Board of Police and Fire Commissioners were based upon cause and supported by substantial evidence. The scope of review of the final decision of an administrator agency is well settled and succinctly stated in *Davern* v. *Civil Service Commission of the City of Chicago,* (1970) 47 Ill. 2d 469, wherein the Supreme Court stated:

> "The Administrative Review Act provides that agency findings on questions of fact are 'prima facie true and correct' (Ill. Rev. Stat. 1967, Ch. 110, par. 274.) We have construed this provision to limit the function of the reviewing court to ascertaining whether the findings and decisions of the administrative agency are against the manifest weight of the evidence . . . . The courts will not reweigh the evidence, but are limited to a determination whether the final decision of the administrative agency is just and reasonable in light of the evidence presented."

In the case at bar the Chief of the Melrose Park Fire Department promulgated a General Order which directed all firemen to be clean shaven and to have their hair cut in accordance with an attached drawing of a human head. Failure to comply with the order would result in disciplinary action. Evidence submitted at the hearing before the Board established that inordinate growth of hair and sideburns could cause an inability to wear a smoke mask required at certain types of fires and would be detrimental to a fireman's safety and the safety of others. It was further established the plaintiff did not comply with the General Order and disobeyed the direct orders of his superior to comply with said General Order. We conclude therefore, that the findings and decision of the Board were based upon valid cause for removal of the plaintiff from his duties and fully supported by the evidence.

The plaintiff's second contention is the denial of his motion for continuance by the Board constituted prejudicial error and deprived plaintiff of a fair hearing. The plaintiff bases his contention on the decision in *Lindeen* v. *Illinois State Police Merit Board,* (1962) 25 Ill. 2d 349, wherein the Supreme Court held the Board's denial of a motion for continuance deprived plaintiff Lindeen of a fair trial.

We do not agree with the plaintiff's contention. It is well settled that the granting of a continuance is a matter which rests in the sound discretion of an administrative tribunal. (*People ex rel. Egan* v. *Dunham*, (1942) 314 Ill. App. 110.) In the instant case, the plaintiff and his attorney did not file a written motion for continuance prior to the hearing but, rather, orally requested a continuance at the hearing. Plaintiff's counsel stated he was requesting a continuance because he was not adequately prepared for trial. At the hearing, however, counsel demonstrated he was well versed in all facets of the circumstances giving rise to plaintiff's suspension and presented an admitted expert in fire fighting devices. Under these circumstances we conclude the Board did not breach its discretion in denying plaintiff's motion for continuance.

Plaintiff's final contention is the findings of the Board were inadequate to support its decision to discharge the plaintiff. The plaintiff argues he was not insubordinate and the order issued by Chief Zito to get a haircut could not reasonably be construed as an order which the plaintiff had to obey. In support of his contention the plaintiff relies primarily on the decision in *Lindquist* v. *City of Coral Gables*, (1971) 323 F. Supp. 1161, wherein the District Court of Florida held a hair regulation was invalid as the City had shown no relationship between sideburns and interference with the proper functioning of the fire department.

We believe the findings of the Board were adequate to support its decision. A review of the record indicates the plaintiff violated a General Order promulgated as a safety measure to firemen as well as victims of fires. Furthermore, the plaintiff violated a direct order of the Fire Chief to obtain a haircut. Such insubordination cannot be condoned. Rules designed for purposes of safety and efficiency must

be followed. What if a fireman refused to wear his uniform, or boots, or fire hat, or ride the firetruck to the scene of a fire, insisting upon doing as he pleased? Such results could be chaotic and disastrous. Personal rights must be reasonably limited when the safety of firemen and others is involved.

For the reasons stated herein, the judgment of the Circuit Court of Cook County is affirmed.

Affirmed.

Adesko, P.J., and Burman, J., concur.

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

SUMMONS
(Filed March 19, 1974)

To the above named Defendant:

You are hereby summoned and required to serve upon Linda R. Hirshman of Jacobs, Gore, Burns & Sugarman, plaintiff's attorney, whose address is 201 North Wells Street, Suite 2122, Chicago, Illinois 60606 an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

/s/ H. Stuart Cunningham
Clerk of Court.
/s/ Dan H. Stevenson
Deputy Clerk.
[Seal of Court]

Date: March 11, 1974

Note:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(U. S. Marshal's Service showing date of service as 3-13-75)

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

1 TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause, before the Honorable Frank J. McGarr, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Tuesday, March 19, 1974, at the hour of 2:00 o'clock p.m.

Present:
Messrs. Jacobs, Gore, Burns & Sugarman
(201 North Wells Street, Suite 2122,
Chicago, Illinois, 60606), by
Mr. Charles Orlove and
Mrs. Linda Hirshman,
appeared on behalf of the plaintiff;
Mr. Richard L. Curry,
Corporation Counsel,
City of Chicago
(City Hall, 5th Floor,
Chicago, Illinois, 60602), by
Mr. Philip M. Sheridan,
Assistant Corporation Counsel,
appeared on behalf of the defendant.

2 The Clerk: 74 C 656, Francis Muscare versus Robert J. Quinn, et cetera, hearing on preliminary injunction.

Mr. Orlove: Good afternoon, your Honor. Charles Orlove and Linda Hirshman appearing for the plaintiff.

I see some—whom I think to be, perhaps, officials from the Fire Department.

The Court: Who is the attorney for the defendant in this case?

Mr. Sheridan: Your Honor, is this Muscare?

The Court: Yes.

Mr. Sheridan: I am, your Honor. My name is Philip M. Sheridan. I am an Assistant Corporation Counsel, your Honor.

The Court: All right, Mr. Sheridan, I will give you a minute to put your coat down.

Mr. Sheridan: Thank you, sir.

The Court: There has been no appearance filed for the defendant. I assume you intend to do that, Counsel?

Mr. Sheridan: Yes, I would like to file an appearance, your Honor.

I would also ask leave, your Honor, to file a motion in opposition to the granting of a preliminary injunction.

The Court: Well, the case is set this afternoon, as I recall, for hearing on a preliminary injunction. And I intend to go forward with that.

3 Mr. Sheridan: Yes, I understand, your Honor.

The Court: You may file your motion, however, and I will look at it.

Mr. Sheridan: I understand, your Honor.

The Court: And, perhaps, if it becomes appropriate, you can argue whatever basis you have for it. But in the meantime, and I assume, Counsel, you will file an appearance some time soon.

Mr. Sheridan: Before I leave the court, your Honor.

The Court: I will count on that.

In the meantime, I have set the matter today for a hearing on such evidence as the plaintiff cares to produce for a preliminary injunction. And I am ready to go forward on that, if you are, Counsel?

Mr. Orlove: Fine, we are ready, your Honor, except that, of course, the Court knows we have just received a copy of this motion, we haven't seen it before this minute.

Also, I would point out to the Court that we have on file our complaint and the motion for a temporary restraining order. The complaint is verified by the plaintiff. And the motion for a restraining order is also supported by an affidavit.

The Court: Those things are deemed—let's assume that the motion for temporary restraining order and preliminary injunction is consolidated for all purposes. Any evidence or argument made in support of one will automatically be considered in support of the other.
4 Your affidavit, therefore, stands in support of the motion for preliminary injunction and anything else you have filed.

So that, I think, the spirit of the rules is that whenever possible we consolidate the two. If you are entitled to a T.R.O., you are probably entitled to a preliminary injunction. Let's assume we are going forward for a hearing on the preliminary injunction issue. Anything of record and anything mentioned earlier in the case is relevant and will be considered.

Do you want to rely on your affidavit or do you have additional evidence?

Mr. Orlove: We can rely upon that affidavit, your Honor, as evidence in support of our case in chief.

The Court: And the affidavit contains pictures of the plaintiff. So to the extent that we have to see the dimensions of his beard, we have that in the record.

Are you prepared to argue the matter, assuming this closes the evidence, Counsel?

Mr. Sheridan: Your Honor, I would like an opportunity to present evidence.—

The Court: Fine.

Mr. Sheridan: —if I may?

The Court: All right. I assume that the plaintiff rests on the pleadings and the affidavit, is that correct?

Mr. Orlove: Yes, that is correct, your Honor. And,
5 of course, we have an opportunity for rebuttal.

The Court: The defense may put in evidence. And you, certainly, have rebuttal opportunity, if it becomes appropriate.

Go ahead, Counsel.

Mr. Sheridan: Your Honor, I have various witnesses that will testify. Can I ask that they all be sworn at the same time?

(Witnesses sworn.)

LEONARD JOHNSON, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Sheridan.

The Court: State your name, sir?

The Witness: My name is Leonard Johnson.

The Court: Your address, Mr. Johnson?

The Witness: 5747 West 64th Street.

The Court: Your business or occupation?

The Witness: I'm a drill instructor at the Chicago Fire Academy.

The Court: All right. Go ahead, Counsel.

By Mr. Sheridan:

Q. Mr. Johnson, can you tell us what subjects you teach at the Fire Academy, please?

6 A. I teach the self-contained breathing apparatus, manufactured by M.S.A. Company.

Q. During the course of the middle part of February, did Lt. Muscare happen to be a student in one of your classes?

A. Yes, sir, he was.

Q. Now, when students appear for the purpose of taking the instruction with respect to this self-contained breathing apparatus, how long is instruction given; how many days?

A. Two days.

Q. Calling your attention to the first day that Lt. Muscare was present there—

The Court: Let me interrupt for a moment. Let's get the plaintiff's name straight. That is Muscare, M-u-s-c-a-r-e, Muscare.

Mr. Sheridan: Thank you, your Honor.

By Mr. Sheridan:

Q. On the first day that Lt. Muscare appeared for the lessons, who did he appear with?

A. He appeared with Hook and Ladder Company 10.

Q. Is he in charge of Hook and Ladder Company 10, or the senior officer there?

A. Yes, sir, that particular shift.

Q. Now, during the course of your instruction, did you have occasion to lecture the students or inform
7 the students, in any manner, with respect to the policy of the Fire Department regarding facial hair?

A. Yes, sir, we do.

Mr. Orlove: I would object, your Honor, to the leading nature of the question, unless this is preliminary—

The Court: I assume we are getting through preliminaries here. The objection is overruled. Go ahead.

By Mr. Sheridan:

Q. Will you tell the Court, what, if anything, you stated on the first day the students were present with respect to that subject matter?

A. When I got to the wearing of the face-piece, I explained the importance of a tight face seal and about the objection of facial hair, whether it be beards, sideburns or moustaches.

Q. At the time you did that, what, if anything, happened?

A. A remark was made.

Q. And who made the remark?

A. Lt. Muscare.

Q. Will you tell the Court what, if anything, Lt. Muscare stated?

A. Lt. Muscare said, "Boston and New York have men with long hair, beards, moustaches, and they are not concerned about it."

8 Q. Now, in the conducting of these classes, is it customary for students to speak out in such a manner?

Mr. Orlove: Objection.

The Witness: No, sir, it is not.

The Court: The objection is sustained. I will disregard it. Go ahead.

By Mr. Sheridan:

Q. Did you have occasion to have the students, on that day, put on the self-contained breathing apparatus?

A. Yes, sir, every member of the company puts the apparatus on.

Q. Now, are you able to tell, when the apparatus is charged, whether or not that person is getting a good facial fit?

A. Only when they test the seal of the face mask.

Q. Do you have to have the machine charged?

A. Yes, sir, you do.

Q. Now, do all the students, on the first day, charge their machines?

A. All but one, sir.

Q. Who was that one?

A. Lt. Muscare.

Q. Now, recalling—

The Court: Would you stop for a moment and ex-
9 plain that a little bit to me? Would you tell me, Mr. Johnson, what do you mean by "charging"?

The Witness: Your Honor, by charging the apparatus, you open up the cylinder valve and your regulator valve on the apparatus, which allows the air, the high pressure air, into the regulator, through the regulator up into the face piece, so you get your air.

The Court: Are you able to tell, by watching a student do this, whether there is a facial seal, whether there is a tight seal?

The Witness: Yes, sir, I can.

The Court: When you said that Lt. Muscare did not charge his, what do you mean; it didn't charge or he didn't do it?

The Witness: He didn't do it, no, sir.

The Court: All right. Go ahead.

By Mr. Sheridan:

Q. Now, on the second day of class, did you have occasion to show them any slides?

A. Yes, sir.

Q. And on the slides—during the course of watching the slides, is there any voice mechanism operating at the same time?

A. Yes, sir, there is a tape recording.

10 Q. Now, at any place during the operation of that type, is any reference made to the subject matter of facial hair and the wearing of the mask?

A. Yes, sir.

Q. And basically can you tell us what the statement states?

Mr. Orlove: Objection, your Honor. That would not be the best evidence of that.

The Court: Well, I assume that Mr. Johnson is reporting something that is part of the instructional material in the class.

Is that right?

The Witness: Yes, sir.

The Court: This instructional slides and tape that you are talking about?

The Witness: Yes, sir.

The Court: All right. The objection is overruled.

What does the tape recording say about facial hair?

The Witness: The tape recording says that sideburns, moustaches and beards will not permit a good fit.

By Mr. Sheridan:

Q. Now, at the time the voice on the tape was making the statement, did Lt. Muscare make any statements?

11 A. Yes, he did.

Q. Can you tell us, if anything, he stated?

A. He said, "New York and Boston have long hair and they are not concerned with the problem of tight face seals."

Q. Now, following the—at any time that day, did any of the students again don these machines?

A. You mean the second day, sir?

Q. Yes, sir.

A. Yes, sir, on the second day every man put the apparatus on.

Q. And what did they do?

A. They walked to the 5th floor with the apparatus on, to get an actual effect of wearing the apparatus while they are exerting themselves.

Q. Now, approximately how many men were in Lt. Muscare's company at this time, taking these instructions?

A. I believe there were five, sir.

Q. And did Lt. Muscare—did he also participate by putting the machine on—turning it on and use it while it was operating, walk these five flights of stairs?

A. No, sir, he did not.

Q. Did he put the machine on at all that day?

A. No, sir.

Q. Did you subsequently have a conversation with
12 any one regarding the attendance of Lt. Muscare in your class?

A. I talked to Chief Prohaska.

Mr. Sheridan: Will you please mark this as Defendant's Exhibit No. 1 for identification.

(The document was thereupon marked Defendant's Exhibit No. 1 for identification, 3/19/74.)

By Mr. Sheridan:

Q. I would like to show you what has been heretofore marked as Defendant's Exhibit No. 1 for identification; and ask you if you recognize that document?

A. Yes, sir, I do.

Q. And what do you use that document for, if anything?

Mr. Orlove: Objection, your Honor.

The Court: Let me—before I rule on that objection, tell me briefly what it is, sir?

By Mr. Sheridan:

Q. Can you tell us briefly what that exhibit is?

A. This is a fire officer's guide for—prepared by the National Fire Prevention Association, on breathing apparatus for the fire service.

The Court: All right. Now the next question is, what use do you put that to—or does the Fire Department put that to, if you know.

13 I will assume there is an objection to that.

Mr. Orlove: Your Honor, if the Court please, there is. I would object to the use of that document without any proper foundation being laid for its credibility, validity.

The Court: Until we get an answer to this question, as to whether it is used, I don't think we can get into that. The objection is overruled.

You may answer. What use is that put to in the Chicago Fire Department?

The Witness: It covers—

The Court: Well, how do you use it, if you use it at all?

The Witness: I use the information in here as far as maintenance of the breathing equipment and how a breathing apparatus is tested and also respiratory hazards in general.

The Court: Do you use it as part of your teaching? Do you use it instructing your students?

The Witness: Yes, sir, I do.

The Court: All right. You may cross examine on its authenticity and its source, Counsel, but over objection, I will allow those answers to stand.

Go ahead.

Mr. Orlove: Do you wish me to examine now?

14 The Court: No, I don't mean now. I mean whenever cross examination is appropriate.

Mr. Sheridan: I have no further questions, your Honor.

The Court: To enlighten me on the contents of that manual, may I glance at that, please?

Mr. Sheridan: Perhaps, I should ask him another question, your Honor.

The Court: Ask him what section is relevant to this problem.

By Mr. Sheridan:

Q. With respect to the subject matter under consideration by the Court, do you use that book in any fashion?

A. Yes, sir, I do.

Q. Can you point out the page you are referring to?

A. On Page 2.

Mr. Sheridan: Would you like me to—

The Court: May I see Page 2, then we will show it to opposing counsel.

You are referring to the portion marked out in yellow?

The Witness: On the left-hand page, Judge, your Honor, and on the—

The Court: All right. At the bottom of Page 2, Counsel, there is a section here called, "Beards, moustaches and sideburns", and it continues over to the top
15 of Page 3. I have read it and you may wish to use it for cross examination.

Mr. Orlove: Yes. May I see it, your Honor?

The Court: Yes.

Any further questions, Counsel?

Mr. Sheridan: No, I do not, your Honor.

Cross Examination by Mr. Orlove.

Q. Is it Officer Johnson?

A. Fireman.

Q. What rank do you hold with the Fire Department?

A. I'm a Firefighter, First Class.

Q. How long have you held that rank?

A. Nineteen and a half years.

Q. And your present position with the Fire Department is an instructor, is that correct?

A. That is correct, sir.

Q. How long have you held that position?

A. Approximately five months.

Q. What subjects do you give instruction on?

A. On the self-contained breathing apparatus.

Q. That is the only subject that you are involved with?

A. Yes, sir, that's the only one.

Q. And the text book that you looked at, and that
16 you have identified, is this your only source material with respect to self-contained breathing apparatus?

A. No, sir, I have other material.

Q. Do you recall the day or days that Lt. Muscare was at the Academy for instruction?

A. Not the exact days, it was some time in February.

Q. Was it one or more than one day?

A. More than one day.

Q. To your knowledge, Mr. Johnson—strike that.

When—I believe you started giving instruction on self-contained breathing apparatus—can I call those masks?

A. Yes, you can.

Q. You started giving instructions on mask five months ago, is that correct?

A. That's right, sir.

Q. Is that the first time the Fire Department had any instruction on self-contained breathing apparatus?

A. No, sir, it isn't.

Q. What material were you given when you were assigned that job of giving the instruction on the masks?

A. I was given a mask program outline, a bulletin put out by the American Standard—National Standards Institute, other reprints of bulletins of findings of masks. And I also have the training book from the International Fire Chiefs Training School. I believe it is called "Ifsta", I'm not sure if I got the right desig-
17 nation of it or not.

Q. Were instructions being given on masks before you started five months ago?

A. Yes, sir, they were.

Q. Masks aren't generally used by all levels of the Department, are they?

A. What do you mean by all levels of the Department, sir?

Q. Well, all units in the Fire Department, do they all use masks?

A. Yes, sir, they do.

Q. Are you saying everyone is assigned to masks?

A. No, sir, I did not say that.

Q. All right. Which units are assigned to masks? Or which units have masks assigned to them?

A. The flying manpower squads, trucks, hook and ladder companies, engines.

Q. Are you saying that all hook and ladder companies are assigned masks?

A. No, sir.

Q. Which hook and ladder companies are?

A. Offhand, I can't tell you that.

Q. But you know that all of them are not?

A. That is correct.

Q. Now, you said that when you gave your talk
18 to the—to that particular company, you were talking about an objection to facial hair?

A. Yes, sir, I was.

Q. With respect to the mask?

A. Yes, sir.

Q. And you included in that long sideburns, moustaches and beards?

A. And beards, yes, sir.

Q. Aren't you aware that the Fire Department permits the wearing of moustaches to a certain extent?

A. Yes, sir, to a certain extent.

Q. But you are telling the men, during this instruction, that moustaches should not be worn when wearing face masks, is that correct?

A. That is correct.

Q. How many men have you given instruction to, approximately, within the last six weeks?

A. Approximately over 100.

Q. And isn't it correct that some of those men, aside from Lt. Muscare, have appeared with moustaches?

A. Yes, they have.

Q. And this is the speech though that you regularly give to all your groups, that moustaches are not to be worn in connection with wearing self-contained breath-
19 ing apparatus, is that correct?

A. Yes, it is.

Q. You gave some testimony about the machine being charged, and I must confess, I don't quite understand it. What do you mean by "machine"?

A. The apparatus.

Q. What does the apparatus consist of?

A. It consists of your air cylinder, your face piece and breathing tube, your harness, which the tank is mounted to, which in turn is put on your back to carry the apparatus.

Q. You also said something about machines being charged, what do you mean by "charged"?

A. Activated so that you can use it.

Q. Have you heard of a product called M.S.A. masks?

A. Yes, I have.

Q. Do you know what those are?

A. Yes, sir, I do.

Q. Would you tell the Court, please?

A. M.S.A. mask is a thirty-minute compressed air mask, used for the protection of firemen or industrial respiratory systems.

Q. And that is a self-contained breathing apparatus, is that correct?

A. That is right, sir.

20 Q. In other words, the air from tanks that are worn by the individual is used for that individual to breathe, is that correct?

A. Yes, sir.

Q. And that is the kind of mask that some of the units on the Fire Department—in the Fire Department use?

A. Yes.

Q. How long have those masks been used, if you know, by the Chicago Fire Department?

A. I do not know how long, no.

Q. Do you really know if they are used at all?

A. Yes, sir, they are used.

Q. Some units use them, is that correct?

A. Some units use them, yes, sir.

Q. And you don't know which units do and which units do not?

A. There are some hook and ladder companies, there are engine companies and the flying squad companies have them.

Q. And some hook and ladder companies do not use M.S.A. masks, is that correct?

A. The reason they don't use them, they are not issued to them as yet.

Q. I see. Well, the fact is that some units do not use—some hook and ladder trucks do not have any masks issued to them as of this time, is that correct?

A. I won't say any masks, they have masks, but it's not the M.S.A. mask.

Q. Can you testify—and do you know of your own knowledge that every hook and ladder truck has some kind of mask equipment assigned to it? We want your knowledge.

A. As far as to my knowledge, the hook and ladder companies do have some type of breathing apparatus.

Q. Now, when you use the word "charging", do you mean that somebody actually puts on the equipment and sees if the air goes—the self-contained air goes into the mask?

A. That is right, sir.

Q. Isn't there another way of testing the mask or an additional way of testing a mask?

A. Not to my knowledge, it has to be put on to—it has to be put on the person that is going to wear it, in order to test it.

Q. Isn't it correct that a mask can be put on without the tanks and tested by hold the tube—by holding your hand over the tube?

A. Yes, you can do that.

Q. In fact, isn't that what is recommended for the proper use of the mask?

A. That is correct.

22 Q. Do you tell your men that when you given them these instructions?

A. No, what I do is go through the procedure of putting the apparatus to work. I do not mention the fact that you can put the face piece on and kink the hose to test it for a seal, because we are going through the process of putting the apparatus on to work with it when we are going through the instructions.

Q. I see. If I understand your testimony then correctly, you are concerned only with giving the men instruction in the total use of the mask, how to put the tanks on, how to connect the tubes and how to wear the mask on their faces, is that correct?

A. That is correct.

Q. And your instruction does not include any tests that should be made by the man each individual time they wear the mask?

A. Yes, sir, there is individual tests that they have to make. They have to test the regulator of it.

Q. What is the regulator?

A. That is the heart of the apparatus, which reduces the high pressure air coming from the cylinder into the regulator, reduces it to a breathable pressure and also supplies the air to the wearer as he demands it.

Q. I see. You say that is the most important part
23 of the whole apparatus?

A. That is right, without that you can't operate.

Q. So if those tanks are working properly, and the pressure is breathing properly, then it can be operated, is that correct?

A. Yes.

Q. During your instruction to the men, do you also have them actually put the mask on, on their faces and test to see whether it is air-tight?

A. Yes, sir, I do.

Q. And will you describe for the Court, how one would properly test to see if the seal is air-tight?

A. When the face piece is put on the face, there are five straps, head straps that you must adjust for tightness, starting at the bottom and then the temple straps and the top one, if necessary. After that, you either kink your breathing tube or put your hand over the bottom and inhale to see if you have a proper seal on the face piece. If you have a proper seal, the face piece will collapse; if not, you will detect leaks around the edge of the face piece.

Q. Or there can be a leak in the tube, isn't that correct?

A. That is correct.

Q. In fact, if you kink the tube or squeeze the tube with your hand, you wouldn't really be testing it properly, would you?

24 A. Well, if you have a kink up close to the face piece and your leak was down here, you wouldn't detect that.

Q. But what if a leak occurred in the tube at the point where it was being kinked, then that wouldn't indicate—that wouldn't be a proper test, would it?

A. I don't follow you, sir.

Q. Well, if one were to kink the tube—that is grasp it in a fist—

A. Yes.

Q. —even at the bottom of the tube, and use that to test the mask, that test would not indicate any leak that might occur where the fist is holding the tube, isn't that correct?

A. It could be, yes.

Q. Right?

A. Yes.

Q. So the only way to test it is by holding the bottom of the tube with your hand?

A. Not necessarily. Like I say, you can't kink the tube.

Q. You just told us if you did kink the tube that might not indicate a leak that occurred where you were kinking the tube.

A. If you had that particular leak right on that kink where you had it grabbed.

Q. Well, are you suggesting to the men that you
25 are training that they should kink the tube like that?

A. Yes, sir, I am.

Q. Even though there may be a leak at the point where they are grasping it with their fist?

A. If there is a leak, it will be discovered, because when the apparatus is used and they return back to quarters that apparatus is given a test.

Q. When is the apparatus used?

A. It's used to perform a rescue, to shut off electrical appliances, gas supply lines, locating the seat of the fire and also for ventilation.

Q. Well, let me ask you this, Mr. Johnson, if one were to kink the tube as you suggest and there were,

in fact, a leak there, but it could not be detected by its fist kinking the tube that is—wouldn't that be dangerous to send that man into a smoke-filled room?

The Court: Counsel, it might be, but I don't see how it is relevant to the issues here. It seems that tightness around the face is the only thing we care about. And if the tube has holes in it that is a problem for the Fire Department. I just don't see where you are heading with that.

Mr. Orlove: Your Honor, it goes, I think, to the ability of this witness to speak authoritatively with
26 respect to the mask.

The Court: All right. We have established that the way he tests and recommends the test by kinking the tube, if that has deficiencies, you have established that. So let's go on to something else.

By Mr. Orlove:

Q. When you are at your instruction do the men test the masks themselves?

A. Yes, they do.

Q. So one checks the other to determine if the face seal is correct?

A. No, the man puts the apparatus on himself individually.

Q. I see.

A. And he goes through the test himself.

Q. I see. And then the man—each man determines for himself whether he has attained a good facial seal, is that correct?

A. Right, yes.

Q. Now, you testified that Lt. Muscare made some remarks about men in Boston and men in New York having beards; what was your response to that?

A. Well, I said, "I don't care what they do in New York or Boston, I am concerned with the men here." And I also went and got an article for him to look at, but he showed very little interest in it, in regard
27 to facial seal.

Q. Directing your attention particularly to the event when Mr.—or Lt. Muscare was at the Fire Academy, did you testify that he did not put the mask on?

A. I did.

Q. How many men were present at that time, when the mask was being tested?

Mr. Sheridan: Could I make an objection, your Honor? I think that the students were requested to put the mask on on both days. And I think the question might be—

The Court: I assume the same class both times. And he did testify that there were about five men in the class.

If you want to pin it down further on either day, go ahead.

By Mr. Orlove:

Q. How many masks were available to the men at the time they were putting them on?

A. On the first day of the class I have one mask that I use for demonstration purposes.

Q. Did the men put masks on on that day?

A. Yes, they did.

Q. They put on that one mask?

A. That is right, they did. And the second day we had two masks, and the reason I use the two masks is
28 because I want both companies to use the one mask to lower the pressure in the cylinder, so that the audi-alarm will ring so that they know what it sounds like.

And it won't be a strange feeling to them. But there were two masks available. You see, the cylinder is charged to 2,216 pound pressure per square inch and with the two companies using one mask, you can lower the pressure in the tanks quicker than you can if you use two masks, so we use the one mask until the alarm rings then we use the other mask.

Q. If I understand your testimony correctly, you are using one mask to check the pressure situation and you are using the other mask to try it on for a face seal, is that what you are saying?

A. No, no, we use the one mask—put it in operation, so the men walk to the 5th floor of the drill academy, walk up and walk back down. Then the companies—each man on the company—on both companies —I have two companies a day—each man puts it on and walks up and down the stairs.

Q. You mean you have five men in each company, is that correct?

A. Yes.

Q. And if you had two companies, then you had ten men?

A. Yes.

Q. And you had either one or two masks and ten men?

A. The second day I have two masks, right.

29 Q. Are you saying that the class—everyone in the class waits while one man puts on the mask and walks up to the—

A. No, we are discussing things.

Q. I am asking you now about putting on the mask, at what point in your instruction—

A. One man at a time walks to the 5th floor, and we are in a group there discussing things, and maybe

questions will come up that one of the men wants to know something.

Q. You mean while one man is walking up to the 5th floor, the others remain with you in the discussion?

A. That is correct.

Q. Now, these classes then, you have Firefighters or Firemen First Class, and their lieutenant, is that correct?

A. Yes, or it could be a captain.

Q. Or a captain?

A. Yes.

Q. And Muscare is a lieutenant, is that correct?

A. That is correct, yes.

Q. And you look to him as an officer to assist you, do you not—

A. Yes.

Q. —in drilling with the men—

A. Yes.

Q. —is that correct?

30 A. That is correct.

Q. And in fact, Lt. Muscare did cooperate with you and assist you in drilling the men, assigning them whatever roles had to be assigned in the drill?

A. That is correct.

Q. He cooperated fully with you on that?

A. Yes, he cooperated fully.

Q. Sure.

I believe you testified, near the end of your examination on direct, that you said after Muscare's company left, you reported something to someone.

A. I didn't say I reported, I said I had a discussion.

Q. With whom did you have a discussion?

A. Chief Prohaska.

Q. And what is his position?

A. Chief Prohaska is the Drillmaster.

Q. Well, you have discussions with him often, don't you, about the work going on in the academy?

A. Yes, sir, I do.

Q. Was Lt. Muscare the subject of that discussion?

A. Yes, he was.

Q. What did you say to Chief Prohaska?

A. I just mentioned about the beard that he had on his face.

31 Q. Do you call what Lt. Muscare has on his face a beard?

A. I call that a beard, yes, sir.

Q. Haven't you heard the word "goatee"?

A. I am not a qualified barber or hairdresser, I don't know a goatee from a beard, sir.

Q. You termed what he has as a beard?

A. Yes, sir, I would term that as a beard.

Q. And you also term what he has on his upper lip as a moustache?

A. From what I can see, I would say it is a moustache.

Q. Did you tell Chief Prohaska that he has a moustache?

A. No, I did not say he has a moustache.

Q. What is it then that you told Chief Prohaska concerning Lt. Muscare?

A. The discussion was about his beard. Due to the fact that he wears a beard, he wouldn't get a good seal on the face piece.

Q. You testified that he didn't put on the face piece, didn't you?

A. That is correct.

Q. So you don't know whether he could get a good seal or not, do you?

A. No, because I have no way of checking.

Q. So you don't know if he could get a good seal
32 on that or not, isn't that correct?

A. According to articles that I have read and tests that have been performed, men with facial hair will not get a good seal on their apparatus.

Q. I am not asking you now about articles you have read, I am asking you, is it not correct you have no immediate knowledge of whether Lt. Muscare could get a good seal or not? You did not see him put on the mask, isn't that correct?

A. That is right.

Mr. Sheridan: I will object to that question. I think the witness has been asked and answered the question. He basically stated that he never saw Lt. Muscare with the mask on. Based on the articles he has read, facial hair will interfere—

The Court: It has been asked and answered now. The answer may stand. The objection is overruled. I assume you are through with that particular question, Counsel.

Mr. Orlove: That particular one, yes, your Honor.

By Mr. Orlove:

Q. Isn't it a fact, Officer Johnson, that there are a number of factors that can affect a good facial seal?

A. That is correct.

Q. What are those factors?

A. Eyeglasses—

33 Mr. Sheridan: Your Honor, I will object to it as being immaterial. The issue here is whether or not

facial hair—well, I just feel whatever else might affect the seal seems to me to be not relevant, your Honor.

The Court: The objection is overruled. You may answer.

By Mr. Orlove:

Q. What other factors affect the seal on a face mask?

A. Eyeglasses, dentures, oddly shaped faces, or if a man had sores or boils along the face piece, he couldn't get a good seal there either.

Q. In fact, haven't you learned from your reading that turning the head affects the face seal?

A. Not if the face piece is secured, just by turning your head, no.

Q. Haven't you read that coughing or smiling affects the face seal?

A. No, I have not.

Q. When you mentioned dentures, aren't you really saying that some people have their face structured differently than others?

A. That is correct.

Q. There is a bone structure involved or a fatty skin tissue involved, and those factors may affect the seal?

34 A. Yes.

Q. And isn't it true, you have seen men come before you who could not get a perfect seal, by reason of a jutting jaw or some other characteristic other than hair that prevented a good seal? Haven't you seen that?

A. The men I have seen have all got a good seal. And I can tell it is a good seal, because when they kink the tube or use the bottom of the tube, the face

piece will collapse on their face and it will stay collapsed as long as they hold it.

Q. And that includes men that have come before you with moustaches, isn't that correct?

A. That is correct.

Q. They get a good seal?

A. That is correct.

Q. So then the articles you have read about face hair affecting the seal aren't wholly correct, as far as the moustache is concerned; you know that from your own observation, don't you? Isn't that correct?

A. That is correct.

Q. So you know that from your own immediate observation at your academy, some of the books you have read are inaccurate when they say that somebody with a moustache can't get a good seal?

Mr. Sheridan: Well, I will object, your Honor, the
35 question has been asked and answered.

The Court: The objection is sustained.

By Mr. Orlove:

Q. Mr. Johnson—or Officer Johnson, isn't it correct you have also had firemen come to you for instruction with, what one might term as sideburns, long sideburns, down to the middle or the bottom of the ears?

A. Yes, I have.

Q. And isn't it correct that you have seen these men put on the mask and obtain a good seal, even though they have sideburns, as what you consider long, to the bottom of their ear?

A. The Fire Department regulations say the sideburns will be to the middle of the ear.

Q. All right. I didn't ask you what the Fire Department regulations said.

A. Would you let me finish my answer? Do you want an answer?

The Court: Just a moment, the answer was not responsive. Restate the question.

By Mr. Orlove:

Q. Isn't it correct that firemen have come to your academy for instruction, having sideburns at the midpoint in the ear or to the lower lobe of the ear?

A. Yes.

36 Q. Firemen have come to your academy in that way?

A. Yes.

Q. And isn't it correct that they have put on the face mask, pursuant to your instructions, and have attained a good seal?

A. As far as I know, I mean I can't—I can't say definitely that it's a good seal.

Q. You are there to determine whether they are using the apparatus correctly, are you not?

A. That is correct.

Q. And wouldn't that be vital to the use of the apparatus to make sure that it is air-tight?

A. That is correct.

Q. So, I assume that you are checking the men that you instruct?

A. I certainly am.

Q. To determine whether they are obtaining an air-tight seal?

A. That I am.

Q. So that these men with moustaches and long sideburns are achieving a good seal?

A. Yes.

Q. And you have seen that yourself?

A. I have seen it, yes.

37 Q. In your reading, with respect to the face masks or self-contained breathing apparatus, have you also read that there is no such thing as a perfect, one-hundred per cent seal?

A. Yes, I have.

Q. That in every case, even one who is clean-shaven, there is an element of leakage, isn't that correct?

A. From what I have read, yes.

Q. You know, as a firefighter of many years, that a fireman cannot be clean-shaven immediately before a run or a call, don't you?

A. That is correct. We start work at 8:00 o'clock in the morning and we may get a run at 3:00 or 4:00 o'clock in the afternoon.

Q. And one may have a face stubble or some hair stubble of a beard, right?

A. It could be.

Q. And I am sure the Fire Department doesn't require their men to shave before they make the run, right?

A. That is correct.

Q. Do you recall ever coming across an article or reading an article from the Los Alamos Scientific Laboratory, from the University of California, concerning facial hair with the use of masks?

A. No, sir, I haven't.

38 Q. Have you ever come across any articles, or this one in particular, where you have read that small moustaches and small Vandyke beards will probably present no difficulty to a face mask?

A. No, sir, I haven't.

Q. Mr. Witness, if I may show you the booklet or the book that you identified in your examination.

Mr. Orlove: And with the Court's permission, if I may read the first sentence?

The Court: Go ahead.

Mr. Orlove: I would like to read it in view of the witness.

By Mr. Orlove:

Q. It says here, does it not, Mr. Johnson, that, "In recent years, a number of court cases developed when fire department personnel challenged orders requiring them to be clean-shaven in order that they could wear breathing apparatus face pieces safely."

Mr. Sheridan: Your Honor, I will object to that question. I think it is this Court's function to determine what the law is.

The Court: Well, it is. I have already read that section. I am aware that there is a division of authority, but I don't know that the witness' conclusion on

39 the point would be helpful, Counsel.

Mr. Orlove: I will withdraw the question, your Honor.

The Court: All right.

By Mr. Orlove:

Q. I assume, Officer Johnson, that you have had actual firefighting experience?

A. Yes, sir, I have.

Q. And have you ever operated under firefighting —actual firefighting conditions with face masks and breathing apparatus?

A. Yes, sir, I have.

Q. Then you know, do you not that before each instance when a man would put on the equipment, it should be tested each time, is that correct?

A. That is correct.

Q. And that no man would go in and use that equipment if there was any leakage, is that right?

A. Either leakage or a malfunction in the apparatus.

Q. Then one certainly would not use that equipment, the Fire Department wouldn't request them to use that equipment?

A. That is right.

Mr. Orlove: Nothing further, at this time, your Honor.

The Court: Any redirect, Counsel?

Mr. Sheridan: Just a few questions.

40 *Redirect Examination by Mr. Sheridan.*

Q. Mr. Johnson, look at Exhibit 2 for identification; and I ask you if you recognize that?

A. Yes, I do.

Q. Tell us, briefly, what it is?

A. That is a tape recording that is played along with the slide program.

Q. And in your testimony, you also mentioned something about some of the other information that you read, was the American National Standards Institute publications, is that correct?

A. Yes, sir.

Q. I would like to show you what has been marked as Defendant's Exhibit No. 2; and ask you if you recognize that document?

A. Yes, sir, I do.

Q. Is that the document you are referring to?

A. Yes, sir, this is the one I am referring to.

Mr. Orlove: I object to those, your Honor, being offered at this time on redirect examination.

The Court: I don't know whether they have been offered or not.

Mr. Sheridan: Your Honor, I would offer them.

41 The Court: Well, the recording, we have already heard testimony as to what is on the tape, I don't think it adds anything to the evidence we have already heard.

What is the booklet or whatever the document was?

Mr. Sheridan: Your Honor, the other document, I will hand to the Court, your Honor.

The Court: Yes. All right. Over objection you may introduce that document at this time. Give it to counsel, he may wish to cross examine further on it. And I will allow him to do so.

Mr. Sheridan: I have no further questions.

The Court: The offer of this tape is refused. There is a reference—

Mr. Orlove: I beg the Court's pardon, I didn't hear the Court's ruling.

The Court: I said, over objection that document may be admitted. The tape is refused. And I call your attention to Page 9, which has a crucial section here. And I said you may cross examine additionally on that, if you wish.

(Whereupon, the document previously marked Defendant's Exhibit No. 2, for identification, was received in evidence.)

42 Mr. Orlove: I might say, your Honor, perhaps, on or off the record, we had no—of course, this is an expedited proceeding, we had no indication what tack the Government was going to take in its defense. So if I could indulge the Court and ask for some time—

The Court: You may, Counsel, but I just saw it for the first time—I think there is only two sentences in

there that are relevant to the issues here. And I am sure you can glance at them and then cross examine further, if you to, on them.

Mr. Orlove: Thank you, your Honor.

Just, perhaps, a few questions, your Honor.

If I understand the Court, this pamphlet is going into evidence?

The Court: Yes, it is.

Recross Examination by Mr. Orlove.

Q. Officer Johnson, when did you first see the document which is in evidence, as Defendant's Exhibit No. 2?

A. I saw that when I first started giving my instructions.

Q. When was that, sir?

A. Approximately five months ago.

Q. So that would be some time in November, is it, or October?

43 A. Right, some time in November.

Q. Are you sure of that?

A. Yes, I am.

Q. I direct your attention to the inside page, which indicates the date here of "Approved, January 8th"—I'm sorry, I withdraw the question.

Having looked this over and I haven't had time to read the whole thing, can you tell us if, anywhere in Defendant's Exhibit 2, there is a definition of beard?

A. There is no definition, no.

Q. And the document says, sideburns, unusual facial contours; is there any definition or description or pictures in here of what is considered a beard?

A. No, sir, there isn't.

Mr. Orlove: No further questions, your Honor.

The Court: Anything further from this witness?

Mr. Sheridan: Your Honor, if I may make this statement with respect to the City's—Defendant's Exhibit 2. I have heard that—and my purpose in offering it was that when they speak of the—on that tape, when they speak of—

Mr. Orlove: I object to the remarks as to what the tape says. The tape is not in evidence.

The Court: Well, I don't think it is important to put it into evidence, Counsel. It has been refused and

44 I won't reverse that ruling.

Mr. Sheridan: Fine, your Honor.

The Court: 1 and 2 have been admitted.

Is there anything further.

Mr. Sheridan: Nothing further.

Thank you, Mr. Johnson.

The Court: You are excused, sir. Thank you.

(Witness excused.)

The Court: Call your next witness.

You recall, sir, that you were administered an oath earlier?

The Witness: Yes, sir.

The Court: And your name, please?

The Witness: Al Lundin, A-l, L-u-n-d-i-n.

The Court: Your address, sir?

The Witness: 1345 Michelle.

The Court: Is that Chicago?

The Witness: Palatine.

The Court: And your business or occupation?

The Witness: I am District Sales Manager for Mine Safety Appliances Company.

The Court: Go ahead, Counsel.

45 AL LUNDIN, called as a witness on behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. Sheridan.

Q. Can you tell the Court what Mine Safety Appliances Company is, please?

A. They are a manufacturer, located in Pittsburgh, of devices for personal protective devices of various kinds, such as hard hats, goggles, dust respirators, instruments for detecting toxicant materials.

Q. Now, does your company sell various self-contained breathing apparatuses to any fire department?

A. Yes, sir.

Q. And in this area, can you tell us what departments or city agencies you sell these apparatuses to?

A. Yes, most of this is done through fire department distributors, in some cases we do sell direct, but generally through fire department distributors located throughout the country.

Q. Does your company furnish the City of Chicago Fire Department with any self-contained breathing apparatus?

A. Yes, sir.

Q. Now, in addition to being District Sales Man-
46 ager for Mine Safety Appliances, do you teach any course with respect to the safety aspects of these safety devices?

A. Yes, I do.

Q. Can you tell us where you teach this course?

A. At the National Safety Council here in Chicago.

Q. Briefly, can you tell us what the National Safety Council is?

A. This is probably the safety organization in the country that coordinates record-keeping, dispenses information to—it has various sections, industrial sections, mining sections, chemical sections, home and farm sections, agricultural sections.

Q. Can you tell us what subject you are associated with with that institution?

A. All right. I teach basics of respiratory protection to the basics of industrial hygiene group to the Council.

Q. And does your teaching in all encompass the field of self-contained breathing apparatuses?

A. Yes, it does.

Q. Can you tell us who attends these classes?

A. Generally safety directors, really from throughout the world, but primarily from various companies throughout the United States, major companies, as well as small companies.

Q. Generally can you just tell us what fields are encompassed when you conduct these classes?

47 A. A large part of the class is taken up with current laws governing the selection and use of respiratory devices. And then actual samples are on hand and we discuss the three main basic types of respiratory devices from the mechanical filter, small mechanical filter apparatus into a self contained breathing apparatus.

Q. Now, with respect to the law, is the Occupational Safety and Health Act in any way involved?

A. Yes.

Mr. Orlove: Objection, your Honor.

The Court: What is the basis for the objection, Counsel?

Mr. Orlove: Well, counsel seems to be eliciting testimony now with respect to the witness' legal conclu-

sions or conclusions as to the state of the law, which is not appropriate.

The Court: Well, it isn't, but maybe he knows more about the Occupational Safety Act than we do. Let's hear him and we will decide, in any event.

Go ahead.

The Witness: What was the question?

Mr. Sheridan: You do, is that correct?

The Court: Is the Occupational Safety Act in any way involved; and I think the answer was yes. Go on from there.

48 The Witness: Yes, very much so. It is now the outgrowth of the William Steiger Act, which was intended to add additional protection to the industrial—and I believe—municipal worker in the United States. So it became law on, I think, April of '71, I believe, the Occupational Safety and Health Act.

By Mr. Sheridan:

Q. What standards are used? Do they refer to any standards in that act?

A. Yes. As a matter of fact, the standards were set up—the standards references within the act were set up prior to the law coming into effect. So that the law, for the most part, either references standards already in existence—

Q. What standards would they be, can you tell us?

Mr. Orlove: Your Honor, again I would like to object, for two reasons. Number one, when we are talking about standards set forth in an act, the act is available for all of us to read, as lawyers and judges. Number two, as I am listening to the testimony there does not seem to be any connection made with respect to the facts in this case.

The Court: I don't see it yet, either.

But I assume, Counsel, that you intend ultimately to—well, there is no jury here—let's discuss this? Where are you heading with this, is there an incor-

49 poration of the National Safety Council standards into the act; is that what you are leading to?

Mr. Sheridan: Well, it's my understanding, your Honor, that within the Occupational Safety and Health Act, they encompass the standards of the American National Standards Institute.

The Court: All right. Is this witness going to be able to testify to your expectation that there is some such standard that will apply precisely to this face mask question? Is that what you expect now, I assume that is where you are heading?

Mr. Sheridan: Well, it was my impression, your Honor, that this in some regards was the American National Standards Institute.

The Court: I see. All right, then over objection, you may go ahead. This is leading up to some connection with your Exhibit 2, I assume?

Mr. Sheridan: Yes, your Honor.

The Court: All right. Go ahead.

By Mr. Sheridan:

Q. Mr. Lundin, we'd appreciate it if you'd look at Exhibit 2; and are those the standards you refer to, with respect to the standards that were adopted or referred to by OSHA?

50 A. Yes, sir.

Q. Now, during the conducting of your classes, do you have any occasion to discuss with them the obtaining of a facial seal on self-contained breathing apparatuses?

Mr. Orlove: Your Honor, again I object, because if where it is taking us, we have no foundation of a connection in this case that Chicago Fire Department officials or personnel are subject to or bound by Mr. Lundin's interpretation of OSHA or his lectures.

The Court: Let me ask, Mr. Lundin, whether you are familiar with the self-contained breathing apparatus that is used by the Chicago Fire Department?

The Witness: Yes, your Honor.

The Court: Is it your company or your sales effort that has had something to do with their buying this equipment?

The Witness: No, these were sold through our distributor.

The Court: But you are familiar with the equipment that they use and which has been the subject of earlier testimony? I note that you were in the courtroom during the earlier testimony?

The Witness: Yes, your Honor.

The Court: Then with regard not to the general
51 face masks or anything of that sort, and limiting your answers to this particular equipment used by the Chicago Fire Department, with which you are familiar, you can go ahead on that line.

Mr. Sheridan: Okay.

The Court: Let the record indicate that it is over objection, so that counsel may make his record.

By Mr. Sheridan:

Q. With respect to the self-contained breathing apparatuses used by the Chicago Fire Department, can you tell the Court what, if any, in your opinion, would be the effect of facial hair on obtaining a facial seal?

Mr. Orlove: I object to an opinion by this individual, as not being qualified as an expert.

The Court: Over objection, you may answer. Go ahead.

By the Witness:

A. Yes, I rather firmly take the stand that facial hair, by law, by the ANSC standards, and from my own observations would affect a facial seal.

By Mr. Sheridan:

Q. Can you tell us in what manner it would affect a facial seal?

A. It's looked upon as a facial seal being the main point that has to be obtained in any type of respiratory
52 device, whatever type it might be—and this is brought out in, I guess, various studies that have been made—without affecting this seal, you cannot only conceivably affect the operation of the apparatus, but certainly your breathing toxic materials or the possibility of breathing of toxic materials through the face piece and into the wearer.

Q. Now, if someone places an order with your company and obtains a certain type of self-contained breathing apparatus, they come in standard sizes, is that correct?

A. Correct.

Q. And do these sizes fit all people?

A. We certainly intend that they should. There may be—I think we say something on the order of ninety-seven, ninety-eight per cent of all the people we expect to fit them with, yes.

Q. Now, if one person were to be able to obtain a seal with some facial hair, would that necessarily mean that all others would also?

A. No, this has to do with the facial—different facial sizes and shapes and so forth. So that you can say

that an individual who could form a seal, with the variously shaped moustache or whatever, doesn't mean that that same size moustache or beard on another type of face would affect a seal. And I have noticed a tremendous variance, where you have a big, heavy-set face versus the narrow smaller face, on the position-
53 ing of the face piece on the face. It makes a tremendous difference.

Q. Would the presence of facial hair even if a person—assume a person were to obtain a seal, would the presence of facial hair in any way affect his ability to maintain that seal?

A. Yes, I would say so.

Q. Why would you say so, sir?

A. Well, it's bound to. As I mentioned before, it is very difficult to form a seal to the face under the best conditions, and facial hair of any type is going to endanger that. And to the extent that, perhaps, you can affect a seal, but the seal is not as strong. So that as he would do various things during his operation, this seal could be broken conceivable—or more easily broken.

Q. Mr. Lundin, is it correct or incorrect that sometimes the only person who can tell if there is an effective seal would be the person wearing the mask?

A. That is correct.

Q. That is correct?

A. Yes.

Q. And approximately on the—or where does the seal end, in relation to the neck, can you tell us that?

A. It is going to vary considerably with the facial type of the individual.

54 Q. Do you have any publication or sales brochure which would indicate the type of mask worn by the Chicago Fire Department?

A. Yes. There are three main types, all of them within the Chicago Department; that is, different styles of manufacture. This is the more recent one. And then you have what you call a clear-view.

Mr. Sheridan: Would you please mark this as Defendant's Exhibit 4?

(The document was thereupon marked Defendant's Exhibit No. 4 for identification, 3/19/74.)

By Mr. Sheridan:

Q. I would like to show you Exhibit 4, and that is the publication of MSA that you were looking at, is that correct?

A. Yes.

Q. Can you identify for the Court, please, the pages on which the mask that the Chicago Fire Department has?

A. All right. That is on Page 24, is the Chicago Fire Department mask. And you can get—did you want these other face masks too?

Q. If you will just name a page and point out the one that the Chicago Fire Department has?

A. Page 24, the Chicago Fire Department has.

55 Q. Now, you indicated—is that the exact—are there any variations in the self-contained breathing apparatus that the Chicago Fire Department has, opposed to the photograph shown on Page 24 of this publication?

A. No.

Q. Are there any other pages where the Chicago Fire Department has some of this equipment?

A. Yes, I believe there are. Page 23, the Chemox mask represents another type. However, the ones that the Chicago Fire Department has do have different face pieces than the one pictured.

Q. So you have indicated Pages 23 and 24; are there any other masks that you know that the Chicago Fire Department has?

A. I don't believe so, you may have some of the older styles of that shown on Page 24.

Q. Now, are the stylings of these masks changed at various times through research and development or one thing or another?

A. Yes, they are. More through changes in the laws, or one thing or another.

Mr. Sheridan: Your Honor, at this time, I would like to offer this as an exhibit.

Mr. Orlove: I object, your Honor, because just a picture of the mask, I don't think it tells the Court
56 anything. There is really a serious question as to whether this witness has any direct knowledge of what the Chicago Fire Department has.

The Court: He has testified that he has.

So what it's worth, it may be admitted, over objection.

Mr. Orlove: Did the Court say it will be received?

The Court: Yes, it may be admitted for whatever it may be worth.

(The document previously marked Defendant's Exhibit No. 4 for identification was received in evidence.)

The Court: It isn't as good as a mask, but it is better than nothing.

Go ahead, Counsel.

By Mr. Sheridan:

Q. Mr. Lundin, based upon the mask that the Chicago Fire Department has in operation, do you have an opinion whether or not the presence of a goatee—such as worn by the plaintiff in this case—would adversely affect—whether or not it would adversely affect the obtaining and maintaining of a good facial seal on a self-contained breathing apparatus?

Mr. Orlove: I object, your Honor.

57 The Court: Over objection, you may testify. Do you have such an opinion?

The Witness: Yes.

The Court: And what is it?

The Witness: I would be very skeptical of it, yes, of being able to maintain a good seal.

Mr. Sheridan: I have no further questions of the witness?

The Court: Do you wish to cross examine, Counsel?

Mr. Orlove: Yes, your Honor.

Cross Examination by Mr. Orlove.

Q. Is it correct, you do work for MSA Company?

A. Yes, sir.

Q. And if I understand your testimony correct, you do not sell masks directly to the Chicago Fire Department?

A. No, we deal—we go through a distributor here.

Q. And as far as you know, perhaps the Chicago Fire Department buys from a distributor in Chicago or elsewhere?

A. Right.

Q. And you don't have that information?

A. No—well, at the time it occurs, it generally goes out on a bid-type of thing, we are aware of this through the distributor, we are aware of it.

58 Q. You are not certain what equipment they may have from other sources?

A. Oh, no.

Q. Who asked you to testify today?

A. Chief Foley.

Q. Chief who?

A. Foley.

Q. What did he tell you about this case?

A. Very little, other than—in fact, I didn't learn of it until last evening, late yesterday afternoon. And he asked if I would come in and stand by if asked to submit testimony.

Q. Of course, you have never met Mr. Muscare or Lt. Muscare before?

A. No, sir.

Q. He is the man sitting at the counsel table.

A. Not to my knowledge, no.

Q. And, of course, you have never seen him put on either your mask or other manufacturer's equipment?

A. No, sir.

Q. Is that correct?

A. No, sir. That is right.

Q. Now, did I understand you correctly that you said any hair of any type will affect the seal?

59 A. I have to be very suspicious of it. I would suspect that it would affect the seal.

Q. Any facial hair?

A. Well, you are splitting hairs there. Pardon the pun?

Q. Pardon the pun?

A. Yes. Well, I have to be suspicious of it. Certainly anything that is going to interrupt that seal is not desirable. And now it becomes, I suppose, a matter of degrees. So if I have to make a statement, and I do have to make a statement, in schooling and so on, I try to get rid of the idea that hair is not a good thing, it interrupts and interferes with a good seal.

Q. You were in the courtroom, were you not, when Officer Johnson testified as to instances he has personally seen where men with moustaches have tested the equipment?

A. Yes.

Q. And they have attained a good seal?

A. Yes.

Q. Does that surprise you or shock you?

A. Oh, no, not at all.

Q. So then it is possible for facial—for one with facial hair to attain a good seal?

A. Correct.

Q. In fact, isn't it also possible that one with hair
60 on his chin, as opposed to a moustache, could also attain a good seal?

A. Yes, it's possible.

Q. Doesn't it depend on the face?

A. A great deal on the face.

Q. The structure of the face, is that correct?

A. Well, that is one of the things, yes.

Q. Or the size of the jaw, if one were to be wearing hair on his jaw, isn't that correct?

A. That is right, yes. That is one of the reasons I have to be suspicious, because of the various sizes of the face.

Q. Well, being suspicious—and I suppose you mean you are personally suspicious, your own idea that you are suspicious?

A. Well, may I respond to that?

Q. Well, let me ask you a question first?

A. All right. Fine.

Q. While being suspicious, you recognize that there is a possibility that one with a small goatee may still attain a good seal?

A. Certainly.

Q. One with a moustache may attain a good seal?

A. Certainly may, yes, they may.

Q. Then, by looking at Lt. Muscare, as he is sitting here, you can't tell whether he could get a good seal
61 or not, can you?

A. No, this was my indication, I suspect there would be problems.

Q. But you don't know?

A. No.

Q. Isn't it a fact that every man who becomes familiar with the equipment of self-contained breathing apparatus should determine for himself whether he has a good seal?

A. Because of the nature of the test, he is really the only one that can tell whether he has a good seal.

Q. Really, there is another reason too; isn't it that he is the man that is going to go into an adverse or dangerous situation and risk his life with toxicity and smoke inhalation?

A. Well, what he is doing—

Q. He is the one that has to secure in his own mind that he can live with that mask on?

A. Well, he is checking out the apparatus and to be sure that it is operating functionally and it is operating properly with the apparatus, or it is operating properly on him, and this is the purpose of the test that he is conducting.

Q. So if a man were to say to you, I have put on the mask and I know how it works and I have a good seal, you would be confident in that remark, wouldn't you?

A. Yes.

62 Q. You wouldn't question the man, would you?

Mr. Sheridan: Well, I will object, your Honor, whether he would question a hypothetical man under a hypothetical situation.

The Court: Objection sustained. You made your point.

Mr. Orlove: Your Honor, all of the direct examination has been hypothetical.

The Court: It's true, but I don't think it is relevant whether an individual can get a good seal, no matter how much facial hair he has. It is relevant whether the Fire Department can reasonably prohibit facial hair in the interest of getting a good seal. The individual case is illustrative, but I think you have gone as far with it as you can.

By Mr. Orlove:

Q. You are aware, are you not, that there are other factors that can affect the seal, besides facial hair?

A. Yes, sir.

Q. And what are those?

A. I think Mr. Johnson spelled them out very well. Eyeglass frames or temples, lack of dentures, possibly.

Q. Coughing?

A. No, as a matter of fact that doesn't necessarily interrupt the—affect the seal. During the tests required

63 by the Bureau of Mines, and now apparently NIAC, this is one of the tests required to be passed on before an apparatus can be certified or receive an approval is to wear it into—you actually put individuals—there is bench test, then they put individuals into an odorant—a room full of odorants and they are required to go through a number of actions, including chewing and talking and various things. And should they detect any odorant coming through, then that is an indication of, perhaps, they better leave. So really this is one of the things they want to watch for is that they can maintain a seal while an individual does normal things, such as coughing and talking and so on.

Q. Haven't you observed or read among various studies some writers have given an opinion that a small moustache and a small goatee probably will not affect the seal?

A. I can't say that I have read that, no. I have read a number of—I try to read as much of the stuff as I can, and do read a lot of it. I can't specifically recall having seen that. But certainly I have no reason to doubt it.

Q. Pardon?

A. I have no reason to doubt it.

Q. I believe you said that there have been some studies that indicate that perhaps the standard-sized mask will not fit three per cent of the population; did
64 I understand that correctly?

A. Yes. I would hate to be held to that figure, but it is certainly in that area.

Q. In those studies do they indicate what types or what varieties there are that make up that three per cent figure?

A. Not to my recollection, I don't recall that specifically.

Q. Isn't it correct that there is no such thing as a perfect seal at all times, an absolute 100 per cent seal?

A. I understand that, yes, from personal observation, putting them on and where you go through the operation that Mr. Johnson mentioned—which is recommended procedure—and when you inhale and hold that tube, you can feel no leakage at all and you feel the tube—the face piece extending, I feel that I can hold it twenty-four hours, if I can hold my breath that long, it feels like there is absolutely no leakage at all and it is sucked tightly to the face, to me that is a perfect seal. I understand then can hook up with the equipment and detect in the parts-per-million range for various odorants that are being introduced around the face piece, I guess, and determine that in a parts-per million range, they can pick up leakage inside this face piece. And I have no reason, again, to doubt these studies, I assume they are true. I am sure they are.

65 Q. Do you have any knowledge or recollection as to when the City of Chicago purchased these masks from your distributors?

A. Well, they have had masks of ours that go way back, long before my time, here in the City of Chicago. The most recent purchase was, I believe, this past fall, I would say fall through winter.

Q. Fall through winter of 1973-74?

A. Yes, I am thinking—I don't recall just exactly when the purchase was, delivery was continuing, I think the purchase was made last summer, I wouldn't swear to that.

Q. Has delivery been completed, to your knowledge?

A. To my knowledge, it has.

Q. Do you know the quantity of that order?

A. I believe it was 150 apparatuses.

Q. 150 face—

A. Complete apparatus.

Q. There is more than 150 firemen in the Chicago Fire Department, aren't there?

A. Oh, yes.

Q. Do you know anything about this particular purchase, was it designed to equip every firefighter with his own mask?

A. I have no idea.

Q. The most recent purchase was the 150 items?

66 A. Yes.

Mr. Orlove: No further cross examination.

The Court: Any redirect?

Redirect Examination by Mr. Sheridan.

Q. You indicated you were contacted yesterday afternoon by the Fire Department, is that correct?

A. Right.

Q. Have you ever been contacted at any other time recently with respect to a similar issue?

A. By the Fire Department?

Q. No, by anybody else other than the Fire Department.

A. On similar mask problems?

Q. Similar circumstances, yes.

A. Just generally mask problems?

Q. Yes.

A. Yes.

Q. Just within the last three weeks, have you received any phone calls from anyone?

A. Oh, yes, I did.

Q. Approximately how long ago was that?

A. A week ago, I would say.

Mr. Sheridan: I have no further questions, your Honor.

67 Mr. Orlove: Nothing further.

The Court: You are excused. Thank you.

The Witness: Thank you, your Honor.

(Witness excused.)

Mr. Sheridan: I just have one last witness, your Honor.

The Court: All right. Call him.

You have already taken an oath?

The Witness: Yes, sir.

The Court: All right. And your name, please, sir?

The Witness: William F. Foley.

The Court: And your rank in the Fire Department?

The Witness: I am the Acting Chief Fire Mashal.

The Court: I assume that answers your business or occupation.

Go ahead, Counsel.

WILLIAM F. FOLEY, called as a witness on behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. Sheridan.

Q. Chief Foley, did the Chicago Fire Department recently obtain some additional self-contained breathing apparatuses?

A. Yes, sir, they did. During the calendar year 1973

68 we purchased 150 complete units.

Q. And for the year 1974, do you have any idea how much money has been budgeted to the Chicago

Fire Department for the purchase of additional self-contained breathing apparatus?

A. For this year? No, sir, I couldn't tell you the dollar amount. We do have funds available for breathing gear, yes, sir.

Q. Do you know what the amount was for 1973?

A. No, offhand, I couldn't give you an exact dollar amount, but the average price-per-unit is a little short of $400. So you could multiply 400 by 150 and you arrive at the budgeted figure. We did spend all of the budgeted figure for the appropriation of gear.

Q. Now, with respect to the duties of a lieutenant in the Fire Department, would such a person have as much cause to use this apparatus as any other fire-fighter within the Department assigned to a working unit?

A. Yes, sir.

Q. Now, with respect to the—the Chicago Fire Department does not have enough masks, self contained breathing apparatus for each fireman, does it?

A. That is correct. There was no intention ever to do this.

Q. Can you tell the Court how the Fire Department
69 has distributed the self-contained breathing apparatuses that they do have?

A. We originally adopted a self-contain breathing apparatus program back in 1958. At that time the distribution of gear was two masks per hook and ladder company, five masks per squad company. Now, over the years, we have developed a new mask, new equipment and we have augmented this when we retired some of the older masks. At the present time Inventory Control assigns to each hook and ladder two self-

contained breathing gears. Now, I am not saying specifically the type in question here, but there are two breathing gears assigned. Some trucks temporarily may be out of masks, due to the fact that they are in for repair and so forth and there is not enough back-up to maintain the two-per-unit level.

In addition to this, we have equipped, at the present time, some twenty-four companies, engine companies with two masks apiece of the later design. Our intention is—in addition to this we have six flying squads—seven flying squads, who carry six masks apiece. We also are introducing one self-contained breathing gear to each chief officer's car, at the Battalion level. At the present time, we only have three or four of these in service.

Our ultimate aim, though, is complete coverage of the job, pending acquisition of the proper amounts of
70 material.

Q. Chief Foley, with respect to the wearing of the self-contained breathing apparatuses, what does the Chicago Fire Department do with respect to facial hair?

A. Well, we would like the men clean-shaven.

Mr. Orlove: I will object to the question, your Honor, because we have—

The Court: We have the regulation before us and I have read it and I know what it is. So if the witness is going to repeat the regulation, it is unnecessary. Of course, what they like is not too relevant either. So I will sustain the objection.

Mr. Sheridan: I understand, your Honor.

I have no further questions, your Honor.

The Court: Any cross examination of Chief Foley?

Cross Examination by Mr. Orlove.

Q. I am always worried about using the wrong title. How shall I term you "Chief"?

A. Yes.

Q. Chief, you say currently there are supposed to be two masks on each hook and ladder?

A. Yes, sir.

Q. And that is every single hook and ladder?

71 A. All hook and ladders are assigned two masks.

Q. Do you know that there are some hook and ladders that don't have masks at all?

A. I mentioned that before?

Q. Yes, I think you said some are in for repair.

A. Right.

Q. And repair might take months, doesn't it?

A. Availability of parts and labor to repair them.

Q. In fact, hasn't it come to your attention that some hook and ladder trucks never really got masks?

A. That is not true.

Q. How many men are assigned to a hook and ladder truck?

A. There is two different levels of manpower assignment, depending upon the area the truck is protecting. We have five-man companies and four-man companies under the present manning levels dictated us by outside consultants. The particular company involved, is a five-man company.

Q. And you say the "particular company involved", the company—

A. Lt. Muscare's company.

Q. The company in which Lt. Muscare works?

A. Yes, sir.

Q. Is lieutenant the highest officer in the company?

A. No, sir, a captain.

72 Q. I see. What is the scope of Lt. Muscare's—or a lieutenant, but a lieutenant like Lt. Muscare—his operation?

A. The lieutenant commands the company unit or platoon on his platoon in the absence of the commanding officer, the captain.

Q. Is the hook and ladder—does the hook and ladder truck consist of the company itself?

A. Yes, sir.

Q. So his company is a five-man company?

A. Five-man per shift, sir.

Q. I see.

A. Five men per shift. It is staffed on the basis of providing five men each day, each working day on that company, yes.

Q. And he is the chief official for that company on that shift?

A. Yes, sir.

Q. And when you use the number "five", does that include the lieutenant or exclude him?

A. No, that includes the lieutenant.

Q. So you have two masks designed for use by five men in the company?

A. Yes, sir.

Q. I take it by that, obviously, that not everybody fighting a fire in the company is going to be required

73 to use a mask, they may be assigned other duties that don't require a mask, is that correct?

A. Yes. All members are required to be proficient in the use of the mask.

Q. I understand, but—okay, I understand.

But a company might assign men to different areas in fighting a fire?

A. Yes, sir. The company officer would give orders, at his discretion, on the fire-ground problem.

Q. I didn't hear the end of your answer, sir.

A. The commanding officer of the unit may give various orders, depending upon the fire-ground problem.

Q. And is it correct, that usually the lieutenant is in charge of that company and issuing orders to the men to do one job or another?

A. Yes, sir.

Q. Chief, when did the action that was taken with respect to Lt. Muscare first come to your attention?

A. It came to my attention on the 21st of December. The first time it was brought to my attention is when I received messenger mail concerning this incident.

Q. Chief, do I understand your testimony correctly, that since 1958 every hook and ladder truck has had two masks assigned to it?

74 A. No, sir, I didn't say that. I said starting in '58 we started the program for breathing gear and the ultimate goal was two per truck. Eventually, this was realized. Since that time, some of the gear has fallen into disrepair and some trucks are short at this time. But the overall administrative policy is two masks per truck.

Q. And at what point in time did you realize the goal of two gear—two masks per truck?

A. Well, I believe that back in the early '60's all trucks had Chemox masks, which is another type of breathing—it's merely a trade name, but it is a self-contained breathing apparatus.

Q. And are those now out of use, Chemox masks?

A. No, sir, they are not.

Q. They are also used?

A. Yes, sir.

Mr. Orlove: No further cross, your Honor.

The Court: Any redirect?

Mr. Sheridan: Briefly, your Honor.

Redirect Examination by Mr. Sheridan.

Q. Chief, did anything happen to you personally after December 21st?

A. Yes, sir, Christmas night I was a victim of emer-
75 gency appendicitis operation.

Q. So you were incapacitated approximately when?

A. I came back to administrative duties on February 10th or the 12th, I'm not sure without referring to the records.

Q. And did you have any conversation with Chief Prohaska on or about February 21st, 1974?

A. Yes, sir, I did. It was brought officially to my attention by him.

Q. That is all. And Lt. Muscare, he is assigned to a hook and ladder company, is that correct?

A. Yes, sir.

Q. Now, is it the policy of the Fire Department to have—strike that.

Are the self-contained breathing apparatuses—are they normally worn by the firemen at all fires or are they just used in somewhat of an emergency or unusual circumstances?

A. No, generally they are at the direction of the company officer.

Q. Under what circumstances would a company officer order men or he himself put on the self-contained breathing apparatus?

A. Well, rescue would be one condition under hostile environment. Certainly I would use a mask in irrascible type atmosphere, some of which would be highly toxic, poisonous gas, for instance.

76 Q. And is there any policy of the Chicago Fire Department to attempt to have some masks available at any given type of fire?

A. No, there is not a set policy as to the number of masks.

Q. But do certain number of vehicles respond to certain types of fires?

A. Yes, sir. There is a predetermined response to ordinary call for help, yes.

Q. Now, is there any policy in the Chicago Fire Department with respect to taking into consideration how many masks are on each vehicle—as to how many masks they would hope to have at each type of fire, depending on its size and nature?

A. Yes, sir. You mean our administrative goal to try to reach the ultimate—

Q. I am just saying at a certain type-size of a fire.—

A. Yes.

Q. —certain number of vehicles will respond to that fire—

A. Right.

Q. —has the Chicago Fire Department given any consideration with respect to the type of vehicles responding as to how many masks or self-contained breathing apparatuses will be present at that fire?

77 A. Yes, sir.

Q. Are these masks generally located on the same place of each vehicle?

A. It's impossible to do, because the vehicles themselves—

Q. I am referring to same types of vehicles, say hook and ladders?

A. I am also referring to them. All hook and ladders are not the same. All engines are not the same.

Q. With respect to the style of the vehicles, is the style the same generally or generally not?

A. We have tried to standardize as much as humanly possible.

Mr. Sheridan: I have no further questions, your Honor.

Recross Examination by Mr. Orlove.

Q. Chief Foley, in this case we are concerned with the suspension of Lt. Muscare, what officer—what is the lowest rank officer in the Fire Department that may suspend an employee of the Fire Department?

Mr. Sheridan: Your Honor, I will object to that. I think that is covered by Section 10-1-18 of Chapter 24½ of the Illinois Revised Statutes.

78 The Court: It is outside of the scope of the prior examination. What do you have in mind, Counsel? I don't want to foreclose you on anything relevant. I have the suspension before me, it's Exhibit C, which I think you attached to your complaint.

Mr. Orlove: Just the question that counsel raised on redirect as to his unavailability during certain periods of time.

The Court: I didn't understand the reason for that myself.

Mr. Orlove: I took it to be going to the allegations in the complaint as to a conversation that occurred, and, an allegation sworn to by affidavit, a conversation occurred in December and the suspension taking place later in February.

The Court: I see. All right, then go ahead into the matter, if you wish.

Could someone else have signed the suspension order or directed the suspension during your illness, someone else in the Department?

The Witness: Well, I am confused here, your Honor. You are saying it was a conversation in December. There was not, not involving me.

By Mr. Orlove:

79 Q. I wasn't directing that to you, Chief, but to the Court.

I just wanted to ask you—you are Acting Chief Fire Marshal, is that correct?

A. Yes, sir.

Q. Now, isn't it true that subordinates of yours, namely, a captain or battalion chief or division marshal have authority within the Fire Department rules to suspend an individual?

A. No, sir, they could file charges, the suspension would rest in the Commissioner's Office.

The Court: I assume that while you were home ill that somebody else had authority to file—

The Witness: Yes, sir.

The Court: —to order a suspension?

The Witness: There was another man that took my place.

The Court: All right. Is there anything else, Counsel?

The Witness: I follow the counsel's line there. The man that took my place, I don't believe was aware of this, because the mail went into my desk and this man didn't use my office. And I don't feel he was really aware of this paper that was in the process.

By Mr. Orlove:

80 Q. When you say "aware", you mean aware of the appearance of Lt. Muscare?

A. I don't believe the man who took my place, Chief Williams, even knew that there was charges preferred or that there was anything at all in the mill on this.—

Q. Were there charges?

A. —due to the fact it came to me on a holiday weekend, I put it in my office, I left it there. And the 24th was a holiday, I did not come back to work. And Christmas night I was taken sick. And it went on until I came back to work. In the meantime it held in abeyance. This was my own opinion, the man who took my place wasn't aware that there was a set of charges, active set of charges on my desk.

Q. Were there a set of charges on your desk?

A. Yes, sir, they were.

Q. Were you in communication with your office, when you were at home recuperating?

A. Was I?

Q. Yes.

A. No, sir, I was not.

Q. Do you have these charges with you in this courtroom?

A. No, sir, I don't.

Q. Pardon?

A. No, they are the charges that you see here, I believe.

81 You said there were a set of charges there, your Honor.

The Court: I said this was a suspension notice.

The Witness: I'm sorry.

The Court: This is what I am referring to, if this will assist you in your testimony.

The Witness: Yes. Well, this is a suspension notice that goes out from the Personnel Department and not from my office.

The Court: The question is, did anyone give you written charges against Lt. Muscare?

The Witness: Yes, sir, they did.

The Court: All right. And that was a day or two or a few days before you went home and took sick, is that right?

The Witness: Yes, sir.

The Court: All right. Now, counsel is asking if you know where those charges are, the written charges, the document.

The Witness: Yes, sir, they are in the Bureau of Personnel.

The Court: How did they get there, did you forward them?

The Witness: When I returned back to duty, I for-
82 warded them down to the Chief of Personnel, Chief Brown.

The Court: All right. Thank you.

Anything further, Counsel?

By Mr. Orlove:

Q. With respect to the matter of Lt. Muscare, is it correct that you never spoke to him personally—

A. No, sir.

Q. —from December to February?

A. In this matter, no, sir. In January—

Q. I am talking about from December to February?

A. No, sir.

Q. When you returned to work, isn't it correct that you had not?

A. I never spoke with Lt. Muscare about this matter, no, sir.

Q. And it is also correct that you never even saw him during that period of time?

A. That is very true.

Q. I see. Have you had training in masks?

A. Have I had it? Yes, sir, I have.

Q. You have?

A. Yes, sir.

Q. And you have heard the testimony that we have had here this afternoon, haven't you?

83 A. Yes, sir.

Q. About how a man should test his mask to determine whether he has a good seal?

A. Yes, sir.

Q. Well, obviously, you never made any efforts to check whether the face hair that Muscare had affected his seal on a mask or did not?

A. Me personally? No, sir, I did not.

Q. You did not. In fact, no one did, aren't you aware of that?

A. I feel that the only one that could check that would be Lt. Muscare.

Q. Right, he is the only one. And aren't you concerned—

A. I might add, if he made a mistake, it could be fatal.

Q. Yes. To him.

A. And to people that may be depending upon him.

Q. Aren't you concerned that men under your supervision look neat and appear neat?

A. Yes, sir, I am. All commanders are.

Q. And you are concerned that there is an element of discipline in your organization, isn't there?

A. Yes, sir, we are paramilitary.

Q. Well, by that I suppose you mean you expect people to carry out orders?

84 A. Yes, sir, we do.

Q. And one of the orders is not to have eccentric moustaches or other facial hair, isn't that correct?

A. That is true.

Q. And isn't that why Mr. Muscare or Lt. Muscare was suspended, for violation of those rules?

A. Yes, sir.

Q. It had nothing to do with the face piece mask, did it?

A. No, sir, I disagree with that statement.

Q. Well, you never saw him with the face mask, did you?

A. The basic premise of the clean-shaven order is safety, not appearance.

Q. You mean that one should not have an eccentric moustache has to deal with safety, is that what you are saying?

A. Yes, sir, it interferes with the operation of air gear, that is safety.

Q. Do you know what an eccentric moustache is?

A. Not really, no, I don't.

Q. Do you think anybody in your Department knows what an eccentric moustache is, if you don't?

A. Well, I believe that the order not only says "eccentric", but it defines the limits of the moustache.

Q. No, I am not speaking of the order, I am speaking of the word "eccentric" that is used in the order;

85 do you know what "eccentric" means?

A. I would say any moustache that exceeds what the definition of the rule book says.

Q. So the word "eccentric", in your view, is unnecessary in the order, isn't that correct?

A. I would say it is, yes, sir, in English usage, yes.

Q. I can't hear your answer.

A. I would say in English usage, in this particular point, perhaps it is superfluous, yes.

Q. It's what? I'm sorry.

A. Superfluous.

Q. Superfluous. Who drafted that appearance order, if you know?

A. A committee of chiefs was formed back in about 1971, I believe, and they were divided into committees—I couldn't tell you the composition of the particular committee that handled that particular item, but it was forwarded to the then chief fire marshal, Chief Fokamer, who approved it and entered it into the composition of the present rule book.

Q. Were you on that committee?

A. No, sir, I was not.

Q. So you have no direct knowledge as to the basis upon which that order was formulated?

A. No, sir, I do not. I believe though in many con-

86 versations with Chief Fokamer—

Q. Well, I haven't asked you that.

A. I'm sorry.

Q. When you say you are a paramilitary organization, I think you said you expect discipline from firefighters and subordinates; and isn't it a fact that the rules of neatness also relate to discipline, proper discipline in your organization?

A. I don't exactly follow your base thinking. If you mean that neatness automatically gives discipline, I

wouldn't agree with that. Is this the point you are making?

Q. I am just trying to ask the question.

A. Well, it's not clear to me, I wish you would—

Q. But you do require neat appearance in more ways than just facial hair, don't you?

A. Yes. We are a uniformed force.

Q. Yes. And aren't there roll calls taken regularly?

A. Yes, sir, right, this is prescribed.

Q. And men are inspected to examine whether their uniforms are properly cleaned and pressed and according to regulations, is that correct?

A. Yes, sir.

Q. And whether they personally meet cleanliness standards, face and hands, isn't that correct?

A. Yes, sir.

87 Q. Doesn't that deal with discipline?

A. I would say the following of orders is discipline, but personal appearance—I think you are trying to inject something that basically isn't there. Discipline itself does not come from appearance.

Q. If a man came to inspection with a sloppy uniform or unpressed uniform, would he pass inspection?

A. No.

Q. Might he be subject to discipline for it?

A. No, but he might be told to take corrective measures and if he refused to do that then there would be discipline.

Q. Yes. And whether his uniform is clean or not has nothing to do with fighting fires, does it, or with safety?

A. Well, there are many other duties for a fireman besides fighting fires.

Q. Keeping his uniform clean is one?

A. Yes, sir.

Q. And keeping his appearance neat is another?

A. Yes.

Q. Isn't that correct?

A. Yes.

Q. And that is for the purpose of having a well-disciplined force, isn't that right?

A. I would say more for an efficient organization, rather than a well-disciplined force. I don't believe
88 that we are that much on the military side.

Q. So you are kind of a little bit paramilitary, is that what you are saying?

A. Could I explain?

Q. Pardon?

A. Could I explain it?

Q. Well, I don't have the question before you. I think you have explained it.

A. We use the term "paramilitary", because we have levels of rank. It doesn't necessarily stand to follow that our operational orders are of a military nature.

Q. But violation of those orders can subject one to discipline?

A. I am sure that is true of any organization.

Q. Yes. One who has dirty shoes can be disciplined in the Chicago Fire Department, isn't that right?

A. I would think not.

Mr. Sheridan: I object to that. I feel this is irrelevant.

The Court: The answer may stand.

By Mr. Orlove:

Q. Would one pass inspection with unclean shoes?

A. No.

Q. And if he continued to pursue that, after being instructed to clean his shoes, he would be disciplined,
89 wouldn't he?

A. That is a different matter. Now, he is refusing to follow orders. Now, that is a little different than having dirty shoes.

Q. I see. So if one is told to shave off his moustache, he is not following orders if he doesn't, is that correct?

A. No, we don't have an order to shave off a moustache. We have an order to trim it to conform to the section of the rule book that is appropriate.

Q. If one is told to shave off facial hair and he does not, then he is not following orders, is that correct?

A. That is true.

Q. And that is orders in the military sense, to carry out orders, is that right?

Mr. Sheridan: I will object, your Honor. I think any department has right to request a subordinate to do something in accordance with the rules of that department. And if they don't they can be disciplined. It is not necessarily the military sense, it's any sense.

The Court: That is not an objection, it's an argument, Counsel.

Mr. Orlove: More than that.

The Court: The answer may stand. I don't believe it—what was your answer?

90 The Witness: You have got me confused. Restate the question.

The Court: Do you want to repeat it or do you want it read.

Mr. Orlove: I would like to hear as much of it as the witness answered. I know there was an answer there that was cut off.

The Court: My point is, that he has forgotten your question.

Mr. Orlove: I will restate it.

The Court: Thank you.

By Mr. Orlove:

Q. If a firefighter was asked to shave off facial hair and did not do so, that would result in discipline, would it not, in your organization?

A. He would if the facial hair was beyond the extremes as set forth in our rule book, yes.

Q. Well, your rule book says clean-shaven, does it not?

A. Yes, sir.

Q. What if a man had two days growth of beard, is that clean-shaven?

A. No, sir, it is not.

Q. And I assume he would be ordered to shave it off?

A. Yes, sir.

91 Q. And if he did not, he would be subject to discipline, is that correct?

A. Yes, sir.

Q. And the discipline would be for failure to obey an order, isn't that right?

A. True.

Q. So, it is the order that you want obeyed is the purpose behind that regulation, isn't it?

A. Yes, sir.

Q. And you want orders obeyed in a military sense?

A. No, we want orders obeyed because we have a reason to have a man clean-shaven, for safety with air gear.

Q. I'm sorry, I didn't hear you.

A. We have a reason for him to be clean-shaven, and that is safety, safety with air apparatus, air gear, masks.

Q. Are there men in the Fire Department who have administrative positions, who do not actively fight fires?

A. Yes, sir.

Q. Drill Instructor Johnson is one of that kind, is he not?

A. His present assignment is that, yes.

Q. Must he be clean-shaven?

A. Yes, sir. All uniformed members. The book of rules apply to all men in uniform.

Q. It applies to them whether they are in a hazard-
92 ous situation or not—

A. Yes, sir.

Q. —is that right?

A. Yes, sir.

Q. So then it has to do merely with appearance of the individual, doesn't it, not only safety?

A. Firefighter Johnson's tour of duty could end in five minutes and he could be assigned to some other duty.

Q. Then he could have in five minutes, couldn't he?

A. If an emergency would arise tonight, Firefighter Johnson may be pressed into duty somewhere else.

Q. And could shave within that period of time, couldn't he?

A. You would have to ask Firefighter Johnson on that.

Q. Well, we all know the answer.

Aren't there other personnel under—in the employment of the Chicago Fire Department who are administrative personnel who do not actively fight fires?

A. Yes, sir.

Q. And they are required to be clean-shaven, in accordance with your Department rules, whether they are fighting fires or in a hazardous condition or not, aren't they?

A. Do you mean all personnel now?

Q. Yes.

A. No, that is not true. We have exceptions, we
93 have civilian employees, non-uniformed members of the Fire Department.

Q. Are they subject to the Fire Department rules?

A. Not in the book of rules, no.

Q. I didn't hear your answer.

A. They are subject to the direction of the Fire Commissioner, but not the book of rules for uniformed persons.

Q. But aren't there uniformed firefighters who are not actively assigned to a firefighting situation?

A. Yes, sir.

Q. And they are uniformed personnel, aren't they?

A. Yes, sir.

Q. And they are not exposed to any hazard in the line of their duty with the Chicago Fire Department, is that correct?

A. Yes, sir.

Q. But they are required to be clean-shaven at all times, is that correct?

A. Yes, sir.

Q. And there is no jeopardy to their safety or involvement of their safety there, is there?

A. Well, if there is no change of their assignment, which is not—there is no guarantee of that.

Q. Yes. But when they are in their non-hazardous assignment they must comply with the appearance rule?

A. Yes, sir.

94 Mr. Orlove: No further cross.

By Mr. Sheridan:

Q. Chief Foley, when a uniformed member of the Fire Department has an assignment, he can leave the assignment at any time at the direction of his supervisors, is that correct; he can be ordered from one assignment to another assignment at the direction of his supervisors?

A. Yes, sir.

Q. And you indicated that the reason—one of the reasons that the Fire Department requires a person to be cleanly shaven is because of the mask, is that correct?

Mr. Orlove: Objection, because I think I am going to hear a leading question, that is very—in a very critical area, your Honor?

The Court: The objection is sustained. The question was leading.

By Mr. Sheridan:

Q. Chief, calling your attention to Section 51.133 of the Rules and Regulations of the Chicago Fire Department; will you tell me what the Chicago Fire Department—the purposes for that rule the Chicago Fire Department has?

Mr. Orlove: I object. The witness has already testified he was not part of the committee that formulated that rule and he has no knowledge of it, there is no—

95 The Court: He also testified as to the purpose of the rule in response to your questions, I don't think it has to be repeated. The objection is sustained.

Mr. Sheridan: I have no further questions, your Honor.

Mr. Orlove: Nothing further.

The Court: You are excused. Thank you, Chief.

(Witness excused.)

The Court: Does the defense have anything further?

Mr. Sheridan: Nothing further, your Honor.

The Court: Does the petitioner have any rebuttal?

Mr. Orlove: We would, your Honor, but I would like to have a five-minute recess.

The Court: All right. Five minutes. Let's make it five minutes, I would like to finish this tonight.

Mr. Orlove: Yes, your Honor.

(Whereupon, a recess was had, after which the following further proceedings were had herein, to-wit:)

The Court: Counsel?

Mrs. Hirshman: I call Lt. Frank Muscare.

(Witness sworn.)

96 FRANCIS MUSCARE, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mrs. Hirshman.

Q. Please state your name for the record, please?

A. Francis Muscare.

Q. Lt. Muscare, calling your attention to the dates of February 15th to the 21st, 1974; did you say any-

thing with regard to facial hair in the course of your training in the use of the self-contained breathing apparatus?

A. You are talking about at the academy?

Q. Yes.

A. Yes, Instructor Johnson—yes, I did.

Q. What, if anything, did you say?

A. After he got done with his lecture, I asked him if they were the same type of apparatus they used in Boston or New York.

Q. And what was his response?

A. He said he believes so.

Q. Did you say anything further?

A. I asked him how come they weren't concerned with hair?

Q. And what was his response?

A. I believe he said that he didn't know.

97 Q. Thank you. Lt. Muscare, have you ever grown a goatee and a moustache before?

A. Yes, I have.

Q. Has the—were the goatee and the moustache that you grew before essentially the same size and shape and general appearance as the one you have now?

A. Yes.

Q. Has the subject of your goatee and moustache ever arisen with regard to Second Deputy Johnson?

A. I don't understand the question.

Q. Did the subject of your goatee and moustache from the past ever arise with regard to—I believe, it's Second Deputy Johnson?

A. Yes, it did.

Q. And when did this arise? Approximately when did this arise?

A. In the last three years.

Q. And where did this incident arise?

A. Engine 4—

Mr. Sheridan: Your Honor, if I may, I would like to make an objection as to the relevancy of this line of questioning. We are dealing here with the suspension. It was invoked in February, based upon at least, to some degree, to the recommendation of Chief Mor-
98 gan and as based in the complaint, that it was in December of 1973. I think going back before that date is irrelevant to the issues before this Court.

The Court: It may have relevance. Over objection, it may go ahead.

By Mrs. Hirshman:

Q. Who was present at the time that the subject of your goatee and moustache arose with regard to Second Deputy Johnson?

A. Johnson and Chief Mueller, the Third Division Marshal.

Q. What was said at that time?

A. The first time they ordered me to shave it off and I refused.

Q. With respect to Second Deputy Johnson, what, if anything took place, as a result of your continuing to wear your moustache and goatee?

A. At uniform inspection, he refused to inspect me with the goatee on.

Q. With regard to your moustache and goatee from the past did the subject ever arise in connection with Chief Maley?

A. I don't understand the question.

Q. You had a moustache and goatee several times in the past, did the subject of your moustache and goatee ever arise between you and Chief Maley?

A. That would be the same incident.

99 Q. What was said?

A. That I was working under charges at that time.

Q. With regard to the subject of your moustache and goatee, did the question of your choice of wearing a moustache and goatee ever arise with regard to a group of your supervisory officers?

A. The following year I had another one, right, I did.

Q. When did the subject arise with regard to your superiors; approximately when?

A. Well, I was ordered down at 9:00 o'clock in the morning on my off day to go in front of the Board, Chief Fokamer, Chief Brown, Johnson, Dean—I don't remember who the other two were, but there were five or six.

Q. And where did this meeting take place?

A. At the academy.

Q. What was said?

A. Generally?

Q. In the order that it was said. You went down to the academy and what was said?

A. Chief Fokamer did the speaking.

Q. And what did he say?

A. He informed me that—he said he didn't think I knew what discipline was, because of my general attitude about the goatee. And he didn't believe at that

100 time that I had been in the service or I would have understood. And then I told him I was a paratrooper in the service for approximately three years. And he had informed me we weren't there to argue and they could not tolerate me going to work the next day with the goatee.

Q. And what was the result of this?

A. I removed the goatee.

Q. In any of those incidents—in any of the incidents that you have just recounted with Johnson, with Maley, with the group of your superiors, including Chief Fokamer, did anyone ever say anything to you with regard to the self-contained breathing apparatus?

A. No.

Q. Calling your attention to—I have just had this marked as Exhibit No. 1—can you identify that document?

A. This is a general order issued by the Fire Department.

Q. Have you ever seen that order before?

A. Yes, I have. I read it at roll call.

Q. When did you read it at roll call?

A. I would say on or around the day it is issued, maybe a month later.

Q. What does that order say?

A. "Proper Personal Appearance."

(The document was thereupon marked Plaintiff's Exhibit No. 2 for identification, 3/19/74.)

101 Mrs. Hirshman: Your Honor, I would move that the Chicago Fire Department Order No. 685, I believe it is, be entered as Plaintiff's Exhibit 1.

The Court: Any objection?

Mr. Sheridan: Can I see it?

Mrs. Hirshman: Certainly.

Mr. Sheridan: No objection, your Honor.

The Court: It may be admitted.

Mr. Sheridan: Your Honor, I say no objection, I am objecting only in the respect that it is prior to the suspension that we are here considering, your Honor.

The Court: It would have to be or we couldn't suspend anybody on the basis of it, I would assume.

Over objection, it may be admitted.

(The document previously marked Plaintiff's Exhibit No. 1 for identification was received in evidence.)

The Court: This is substantially the same as the regulation that is in issue here, is it not?

Mrs. Hirshman: Yes, your Honor.

By Mrs. Hirshman:

Q. I have just had this document marked Exhibit 2; have you ever seen that document before?

102 A. Yes, I have.

Q. What is it?

A. It's Order No. 685, issued by the Fire Department to, be read at three consecutive roll calls.

Mrs. Hirshman: I move the entry of Plaintiff's Exhibit No. 2, an order of the Chicago Fire Department, dated May of 1970, Order No. 749.

Mr. Sheridan: No objection, your Honor.

The Court: It may be admitted.

(The document previously marked Plaintiff's Exhibit No. 2 for identification, was received in evidence.)

By Mrs. Hirshman:

Q. Lt. Muscare, have you ever had any experience with the array of equipment that we call the self-contained breathing apparatus?

A. I believe we have had them for almost two years, not longer.

Q. Under what conditions have you had experience with the self-contained breathing apparatus?

A. They used them at the John Hancock fire, and I believe in the sub-basement. Two instances that come

up of the—Ambassador East Apartments, I believe it was.

103 Q. So have you used them several times or how many times have you used them in the past?

A. I would say I used them more than several times.

Q. Did you at the time that you were using these masks have the moustache and goatee similar to the one that you have now or the one that you have now?

A. At the John Hancock fire I had the goatee on, right.

Q. Did you have any adverse reaction from attempting to use the self-contained breathing apparatus?

A. None whatsoever.

Q. Have you ever used the self-contained breathing apparatus under non-adverse conditions?

A. We drill with them, right.

Q. Did you have your moustache and goatee while you were drilling with the apparatus?

A. Yes.

Q. Did you have any experiences with any adverse reaction from having the moustache and goatee when you were drilling with the self-contained breathing apparatus?

A. None.

Q. Calling your attention to the training period at—of February, 1974, the mask training at the academy; did you have any kind of training regarding the fitting of your face mask at the academy in February of 1974?

104 A. We were instructed by Firefighter Johnson.

Q. And what kind of instruction did you receive regarding fitting of your face mask?

A. I believe the first morning we had the different parts of the mask, explaining the parts of the mask and their relative duties to the complete operation.

Q. What other kind of training did you receive with regard to masks?

A. I can't remember exactly, but then we hooked up the air bottle, the functions of the bell, and the duration, after it rings, we have in the building, how to put on the face mask and how to test it.

Q. Did you exercise with the self-contained breathing apparatus on?

A. Not at that time.

Q. Did you put the mask on at all?

A. I did the second day in the drill.

Q. You did. And when?

A. I believe every man put the mask on and went up to the fifth floor, walked across the building, when everybody was done I put it on. I wasn't required to walk up and down. And I tested it to see if it would seal on my face.

Q. And what test did you do to see if the mask sealed on your face?

105 A. Put the mask on, slipping it up over your head on your chin first, take the two side straps on the mask, the top one and then the single one on top, put the tube on, put your hand on the bottom of the tube and suck and it should collapse on your face.

Q. And what was the result of your performance?

A. It collapsed on my face.

Q. Lt. Muscare, how long have you been a member of the Chicago Fire Department?

A. Almost twenty years, a little short.

Q. Are you familiar with Section 61.001 of the Rules and Regulations of the Chicago Fire Department,

"Conduct Unbecoming a Member or Employee of the Chicago Fire Department"?

A. Yes, I am familiar with them.

Q. At any time during the twenty years that you were a member of the Chicago Fire Department, has anyone ever told you what constitutes conduct unbecoming an employee or member of the Chicago Fire Department?

A. You mean diagnose it.

Q. Has anyone ever explained to you?

A. No.

Q. Over the course of the years when you had the self-contained breathing apparatus on your truck and were using it to fight fires, did you test it for seal before you used it?

106 A. You test it for seal every time you use it.

Q. And what were the results of your testing your seal on your face mask whenever you used it?

A. It operated.

Q. I beg your pardon?

A. It was sealed properly.

Mrs. Hirshman: Thank you. No further questions.

The Court: Counsel?

(The document was thereupon marked Defendant's Exhibit No. 6 for identification, 3/19/74.)

Cross Examination by Mr. Sheridan.

Q. Lt. Muscare, I would like to show you what has been heretofore marked as Defendant's Exhibit 6 for identification, which purports to be a photocopy of a newspaper excerpt; and I ask you if you have ever seen that before?

A. Not to my knowledge, no, sir.

Q. And Chief Fokamer never told you or no one else ever told you that the breathing apparatus was involved in the rule with respect to the type of hair and moustache and beard you were required to wear?

A. This is the first time it's ever been brought up.

Q. Now, you were informed at the school, by Mr.
107 Johnson, that the Fire Department required you to be clean-shaven in the wearing of the apparatus?

A. I believe I testified to that answer already.

Q. Now, did you indicate that you never interrupted Mr. Johnson when he was giving the lecture, you just spoke to him after the thing?

A. When he was done.

Q. You heard him testify contrary to that, is that correct?

A. Yes.

Q. Now, with respect to the John Hancock, when did that fire take place?

A. I can't hear you, Counsel.

Q. I apologize. With respect to the fire at the John Hancock, can you tell me when that fire took place?

A. Not exactly. Approximately the time of morning—

Q. The day, approximately when?

A. It was on the 95th floor, in the Surrey Restaurant or something.

Q. When, not where?

A. I don't know when.

Q. Last year or two years ago, three years ago?

A. I had the goatee, if that is what you are inquiring about. Commissioner Quinn was present.

108 Mr. Sheridan: I have no further questions of the witness, your Honor.

The Court: Any redirect, Counsel?

Mrs. Hirshman: No.

The Court: You are excused. Thank you, Lieutenant.

(Witness excused.)

The Court: Do you have any further evidence?

Mrs. Hirshman: No further witnesses, your Honor.

Mr. Sheridan: Can I call Chief Foley for a brief moment, your Honor.

The Court: All right. He is here, you may recall him.

Chief Foley?

If this is only going to be one question, why don't you stand right there. Stay right there. What is it. Go ahead and answer.

WILLIAM F. FOLEY, called as a witness in rebuttal on behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. Sheridan.

Q. Chief Foley, who was your predecessor in your present position?

A. Curtis W. Fokamer.

109 Q. I would like to show you what has been marked as Defendant's Exhibit No. 6 for identification; and ask you if you have ever seen that document before?

A. Yes, sir, I have.

Q. Now—

The Court: Show it to counsel, if you will, I don't think he knows what it is.

By Mr. Sheridan:

Q. Chief Foley, can you tell me where and when was the first time you saw that document?

Mr. Orlove: Your Honor, I must object to the procedure of showing the witness a copy of what purports to be a newspaper clipping—so we are into the area of hearsay.

The Court: Well, I don't know what its relevance is or where we are going to go with it. If it is a newspaper clipping, it is sort of suspicious that it is hearsay from the outset, but what is your intention, Counsel, what are you attempting to prove?

Mr. Sheridan: Well, I am attempting to prove, your Honor, that the—that his predecessor answer a response to a newspaper regarding the purpose of the rule, in answering—in Action Line, I believe it was—and this is not just something we are concocting for the purposes of this lawsuit.

110 The Court: I can understand that. It's just the question does it purport to be a letter printed in the paper from Curtis Fokamer. Is that what it is?

The Witness: No, sir. It quotes Chief Fokamer in answering a question.

The Court: May I see it then?

Mr. Orlove: Your Honor, of course, the problem is, I can't adequately cross examine the witness to whom these questions are addressed, with respect to the truth of that document.

The Court: I assume you are right, Counsel, it is not subject to cross examination. I will sustain the objection to the admission of No. 6, so there is no point to further inquiry concerning it.

Do you have anything further of this witness?

By Mr. Sheridan:

Q. You reviewed and recommended—you reviewed the charges that were sent in by Chief Morgan, is that correct?

A. Yes, sir.

Q. Now, does the Fire Department have a policy whereby an employee is recommended to be suspended or disciplinary action be taken and reviewed by various personnel and the Commissioner then makes a determination whether or not to suspend someone?

111 A. Yes, sir, we have a regular review procedure.

Q. And were you the one that ordered, I believe, Chief Laddis to go out to the firehouse where Lt. Muscare was present, is that correct?

A. Yes, sir.

Q. That is for the purpose of determining whether or not he still had a beard?

A. Yes, sir.

Q. Was the fact that—it was your belief that facial hair would interfere with the wearing of the gas mask, have anything to do with your suspension, your recommendation?

Mr. Orlove: I am going to object, your Honor, for several reasons.

The Court: The objection is sustained.

Mr. Sheridan: I have no further questions, your Honor.

The Court: Thank you.

Mrs. Hirshman: May I cross examine, your Honor.

The Court: I'm sorry, you may have something. If you will just remain there a moment.

Cross Examination by Mrs. Hirshman.

Q. Chief Foley, are you the gentleman who made the decision about the length of Lt. Muscare's suspension?

112 A. Yes, sir—yes, ma'am, I'm sorry. It's not the first time.

Q. Can you explain to us what the reason was for the twenty-nine days for the length of the suspension?

A. Yes, this is—officially it is up to me, when we get a complaint or a set of charges, we make an investigation as to whether there is some substance to them or not. In this case there seemed to be. The particular person involved had been involved in this argument about hair and about the beard prior to this affair and had complied by shaving it off. Now, it was the second time around. And actually at the time I came back from this sick lay-off, it was really—I had thought when I was laid up that he would comply with this and we could get away with a minimum action, but when I found out that some months later, or a month later that he hadn't complied with it, I felt that he had had his preliminary indoctrination to this thing and that it was now time to take a firm stand, from my point of view.

Q. What is the reason for choosing twenty-nine days for the suspension?

A. Well, we feel—I feel, because it was my action—and I might add here there is one more step, when I make this action, it is reviewed by one more authority, the Fire Commissioner must agree with it, that
113 the lieutenant's actions warranted this in my opinion.

Q. Isn't it a fact that if you suspend a member of the Fire Department with Civil Service status for more than twenty-nine days, that is to say for thirty or more days, he is entitled to certain Civil Service protections before the suspension can be effectuated against him?

A. Well, I feel—I don't know—I don't know that much about Civil Service law. I do know this that a

Civil Service employee is protected at every level as to his right and tenure on the job and so forth.

Q. Do you know that a Civil Service employee cannot be suspended for thirty or more days, without being entitled to a hearing or to interrogation and present evidence and so on?

Mr. Sheridan: Your Honor, I will stipulate to the provisions of 10-1-18 of Chapter 24.

The Court: Is that what they say?

Mrs. Hirshman: Yes.

Mr. Sheridan: They say thirty days or more, your Honor.

Mrs. Hirshman: Thirty days or more is what I said, yes, thirty or more days.

Mr. Sheridan: Over thirty days.

The Court: The next question then, Chief, was whether you were aware of that, that a thirty-day
114 suspension would require a hearing?

The Witness: Yes, sir, this is the maximum time assigned to the case, short of going through the trial court.

By Mr. Hirshman:

Q. I see. Then you are saying, in fact, that this was the maximum suspension you could give this member of the Fire Department, without affording him his Civil Service protections?

Mr. Sheridan: Your Honor, I will object to the form of the question.

The Court: The objection is sustained. I think you made your point, Counsel.

Mrs. Hirshman: Thank you, your Honor.

The Court: You are excused again.

Mr. Sheridan: One question, your Honor, please?

Chief Foley, when someone goes to the Civil Service Commission, at that point the determination of what is to happen to the individual is outside the scope of the Chicago Fire Department, is that correct?

The Witness: Yes, sir.

Mr. Sheridan: He can be discharged and suspended for a longer period than thirty days or found not guilty of the initial charge, is that correct?

The Witness: That is true, yes, sir.

115 Mr. Sheridan: No further questions.

The Court: Thank you, Chief.

(Witness excused.)

The Court: Is there any further evidence?

I assume then that both sides rest?

Mr. Orlove: Yes, your Honor.

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

Name of Presiding Judge, Honorable Frank J. McGarr
Cause No. 74C 656 Date Mar. 19, 1974
Title of Cause—Francis Muscare -vs- Robert J. Quinn, etc.
Brief Statement of Motion—Hearing on preliminary injunction

Cause called for hearing on preliminary injunction. Plaintiff rests on the complaint. Evidence heard for defendant. Defendant rests. Rebuttal evidence heard and concluded. Surrebuttal evidence heard and concluded. Court enters its findings of fact and conclusions of law from the bench. Motion for preliminary injunction is denied. Cause continued to Mar. 26, 1974 at 10:00 A.M. for status report. McGarr, J. March 20, 1974

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

Name of Presiding Judge, Honorable Frank J. McGarr
Cause No. 74C 656 Date 3-26-74
Title of Cause—Muscare v. Quinn
Brief Statement of Motion—To reconsider previous ruling and to rule on remaining issues, together with memorandum
Names and Addresses of moving counsel—Linda Hirshman, 201 N. Wells, Chicago
Representing—Plaintiff

Names and Addresses of other counsel entitled to notice and names of parties they represent—Phil Sheridan, Corporation Counsel, City of Chicago, Defendant

Motion of plaintiff for reconsideration and for amendment of judgment is taken under advisement. Cause continued to Mar. 29, 1974 at 10:00 A.M. for ruling on plaintiff's motion to reconsider previous ruling and further status report. McGarr, J. March 27, 1974

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

MOTION FOR AMENDMENT OF JUDGMENT

(Filed March 26, 1974)

Plaintiff Francis Muscare, by his attorneys Jacobs, Gore, Burns & Sugarman, moves this Court, under Rule 52(b) of the Federal Rules of Civil Procedure, for amendment of its Order Denying Plaintiff's Motion for a Preliminary Injunction. In support of his motion, Plaintiff states as follows:

1. That he has shown that the action by Defendant suspending him from his employment with the Chicago Fire Department for 29 days constitutes irreparable injury to him;

2. That he has shown a substantial likelihood of success on the merits of his claim that Sections 51.133, 61.001 and 61.006 of the Rules and Regulations of the Chicago Fire Department are unconstitutional as applied to him, and

that his suspension violated his constitutional right to due process of law; and

3. That Defendant has failed to prove that Sections 51.133, 61.001 and 61.006 of the Rules and Regulations of the Chicago Fire Department are constitutional as applied to him.

Wherefore, Plaintiff prays that this honorable Court reconsider its ruling denying a Preliminary Injunction against the enforcement of Sections 51.133, 61.001 and 61.006 in his case, and enter a Preliminary Injunction prohibiting the Defendant from continuing to suspend him.

Respectfully Submitted,
/s/ Linda R. Hirshman

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION

(Filed March 26, 1974)

I. *FACTS*

Plaintiff Francis Muscare has been suspended from his position as a Lieutenant with the Chicago Fire Department for alleged violation of §§51.133, 61.001 and 61.006 of the Rules and Regulations of the Chicago Fire Department. At a hearing on Plaintiff's motion for a preliminary injunction Tuesday, March 19, 1974, this Court ruled that Plaintiff's suspension under the provisions of §51.133 did not constitute a violation of his right to determine his personal appearance under the United States Constitution (Transcript, Hearing on Plaintiff's Motion for a Preliminary Injunction, Findings of Fact and Conclusions of Law

at pp.6-7. A copy of the transcript is attached hereto and made a part hereof and is hereinafter referred to as "Tr."). The Court specifically found that while §51.133 of the Rules and Regulations of the Chicago Fire Department might be based in part on constitutionally impermissible motivations (Tr.,pp.5-6), the Rule was still sufficiently related to safety consideration to sustain its constitutionality (Tr.,p.6). Although the uncontroverted testimony at the hearing established that Lt. Muscare had never suffered from any safety problems, particularly with regard to the wearing of a self-contained breathing apparatus, the Court ruled that §51.133 could be applied generally to all members of the Fire Department without an inquiry into its particular applicability to one individual such as Lt. Muscare (Tr.,p.5).

II. *ARGUMENT*

A. *Section 51.133 of the Rules and Regulations of the Chicago Fire Department is Unconstitutional as Applied to Plaintiff in This Case.*

Undisputedly, Lt. Muscare has a constitutional right to determine the details of his personal appearance, including wearing a goatee, and this Court so ruled on that aspect of his case (Tr.,p.3). Defendants have attempted to sustain their interference with this right through testimony that their standards for personal appearance are justified by safety considerations; specifically to insure that each fire fighter obtains an adequate seal on his self-contained breathing apparatus. However, the record of the hearing on Plaintiff's Motion for a preliminary injunction held March 19 demonstrates, uncontrovertably, that Plaintiff experiences no difficulty in using his self-contained breathing apparatus by virtue of his goatee.

At the hearing March 19, witnesses for both Plaintiff and Defendant unanimously agreed that the only effective test of the efficiency of a self-contained breathing apparatus is the test that each man performs himself when he dons the mask. Lt. Muscare testified, without rebuttal, that he has used the self-contained breathing apparatus for many years under fire-fighting conditions and has always obtained a proper seal, even when he was wearing a goatee. Thus, the justification for this across-the-board interference with Plaintiff's constitutional rights is simply the generality that in most cases a rule like §51.133 prohibiting some facial hair may tend to promote the interest of safety.

When ruling in the area of constitutionally protected rights, a governmental agency may not make a rule broader than the minimum necessary to effectuate the governmental interests behind the rule. As the Supreme Court held in *Shelton* v. *Tucker,* 364 U.S. 479 (1960):

> Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in a light of less drastic means for achieving the same basic purpose (364 U.S. at 488).

This requirement that when acting in a constitutionally protected area the government must use the "least drastic means" prohibits the use of general classifications when a case-by-case determination is available to the authorities. The Constitutional weakness of permanent, irrebuttable presumptions is so great that even when fundamental civil rights are not involved, such presumptions are disfavored under the terms of the due process clauses of the Fifth and Fourteenth Amendments to the U. S. Constitution. *Vlandis* v. *Kline,* 412 U.S. 441, 446 (1973).

The administrative convenience of establishing a broad classification is insufficient to justify a general incursion on the constitutional rights of individuals within the class. In the landmark case of *Reed* v. *Reed,* 404 U.S. 71 (1971), the State of Idaho attempted to justify its statutory preference for males to be administrators of estates on the grounds that such a rule served the administrative convenience of the State:

> The [Idaho Supreme Court] also concluded that where such persons are not of the same sex, the elimination of females from consideration 'is neither an illogical nor arbitrary method devised by the legislature to resolve an issue that would otherwise require a hearing as to the relative merits . . . of the two or more petitioning relatives . . .' 401 U.S. 71 at 76.

The Supreme Court rejected this justification, ruling:

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the equal protection clause of the Fourteenth Amendment . . . *Id.*

Thus, even where the State can reasonably assert that a legislative regulation accurately applies to most people falling into a classification, when a case-by-case determination is available, the due process clause requires such an individualized determination. *Stanley* v. *Illinois,* 405 U.S. 645 (1972).

There can be no question that such a case-by-case determination is readily available to the Chicago Fire Department for determining whether or not a fireman's personal appearance interferes with the correct usage of his self-contained breathing apparatus. Indeed, as witnesses for both Plaintiff and Defendant agreed at the hearing on March 19, the only way in which the apparatus may be

tested for a correct fit is on a case-by-case basis at the moment of usage by the individual involved. Such a test is not merely available; it is currently in use. Under those circumstances and where, as here, the general rule invades a fundamental constitutional right, such a general regulation is unconstitutional. As the Supreme Court ruled just this year in *Cleveland Board of Education* v. *LaFleur,* 94 S.Ct. 791 (1974):

> While it might be easier for the school boards to conclusively presume that all pregnant women are unfit to teach past the fourth or fifth month or even the first month, of pregnancy, administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law. The Fourteenth Amendment requires the school boards to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty, in support of their legitimate goals. 94 S.Ct. 791 at 799-800.

Section 51.133 of the Rules and Regulations of the Chicago Fire Department is just such an unconstitutional general prohibition. Both sides agree that only Lt. Muscare can ultimately determine whether his face mask seals against his face in a proper manner. He has testified, without rebuttal, that it does so. Thus, as applied to Lt. Muscare, §51.133 is an unconstitutional infringement upon his constitutional right to determine his personal appearance. Further, this general infringement upon his constitutional rights is far more drastic than necessary to insure that each fire fighter is able to use his equipment safely. By suspending Lt. Muscare for failure to conform to §51.133 of the Rules and Regulations, the Chicago Fire Department is infringing upon his constitutional rights, in the absence of any compelling governmental interest in his case, without making the individual determination required by the due process clause of the Fourteenth Amendment.

B. *Section 61.001 of the Rules and Regulations of the Chicago Fire Department is Unconstitutionally Vague.*

1. The Chicago Fire Department has seen fit to suspend Plaintiff for 29 days on the grounds of alleged violation not only of the proper personal appearance regulation, but, in addition, for violation of a rule which prohibits "conduct unbecoming a member or employee of the Chicago Fire Department." §61.001, Rules and Regulations, Chicago Fire Department. Plaintiff has challenged this Section as being unconstitutionally vague. At the hearing of March 19, Plaintiff testified, without rebuttal, that in the twenty years he has spent with the Chicago Fire Department, he has never been apprised of what constitutes "conduct unbecoming a member or employee of the Chicago Fire Department." Such a rule is the very essence of unconstitutional vagueness, and a suspension based even in part on an alleged violation of this rule cannot withstand constitutional scrutiny. See Memorandum in Support of Plaintiff's Motion for a Temporary Restraining Order, § III C.

C. *The Summary Suspension of Plaintiff Violates His Constitutional Rights to Due Process of Law.*

On February 27, 1974, Plaintiff was summarily suspended from pursuing his career as a Chicago fire fighter without the benefit of any procedures comprising basic due process of law. Plaintiff was thus deprived of his property in violation of his constitutional rights. Without notice of the charges against him, without an opportunity to be heard in his own defense, Plaintiff was cut off from his job and his income for actions of which the Fire Department had been aware for at least five months prior to his suspension. At the hearing March 19, Acting Chief Fire Marshall

Foley of the Chicago Fire Department acknowledged that the choice of a twenty-nine day suspension for Plaintiff was determined by the Fire Department's desire to avoid the procedural protections available under State law to a civil servant like Lt. Muscare if he is suspended for thirty days or more. This flagrant violation of Plaintiff's constitutional right to elementary procedural due process prior to being suspended from his job cannot stand. On these grounds alone, Plaintiff is entitled to reinstatement and back pay until such time as his rights are adjudicated by procedures which meet the constitutional standards of due process of law. See Memorandum in Support of Plaintiff's Motion for a Temporary Restraining order, § III D.

III. *CONCLUSION*

Lt. Francis Muscare has been deprived of his constitutionally-protected right to determine his personal appearance under a rule which applies to all fire fighters, regardless of whether or not their appearance interferes with safety. This rule violates Lt. Muscare's right to an individual determination before he can be thus penalized and serves the illegitimate purpose of allowing administrators of the Chicago Fire Department to impose their personal aesthetic preferences upon the members of the Department. For that reason by virtue of the unconstitutional use of a vague rule to supplement the grounds for Lt. Muscare's suspension, and because Lt. Muscare was suspended in violation of his rights to due process, the suspension may not stand.

Respectfully Submitted,

/s/ Linda R. Hirshman

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

EXCERPT

1 Tuesday, March 19, 1974, 2:00 o'clock p.m. Before the Honorable Frank J. McGarr, Judge.

Present:

Mr. Charles Orlove and
Ms. Linda Hirshman,
appeared on behalf of the plaintiff;
Mr. Philip M. Sheridan,
Assistant Corporation Counsel,
appeared on behalf of the defendant.

• • • • •

2 The Court: We are considerably beyond the close of the trial day. Questioning has been broad and in many respects argumentative on both sides. And the areas of argument toward which the questions are directed and are easily inferred. And for this reason I would not require a final argument, which would carry the matter over until tomorrow.

The determination of the application or denial of the application for a preliminary injunction requires that I state certain findings of fact and conclusions of law. Because the matter is simple, I will not require the parties to submit them to me in the form of proposals, but will rather announce findings of fact and conclusions of law now, from the bench, and you may regard my remarks as compliance with the Rule.

Let me first say that I do find that I have jurisdiction in the matter.

And let me note, secondly, the only piece of original research that I have been able to do is the dictionary definition of "goatee", which seems to have

become significant in the case. Webster's Seventh New Collegiate Dictionary—which was the first one at hand—says that a goatee is "a small, trim, pointed or
3 tufted beard on a man's chin." As I speculate on this, it seems to me that it is obvious that a goatee is a beard and that the significance of the word is that it is certain type of a beard, characterized by smallness and, perhaps, by the fact that it is pointed.

I think the decisions make it clear that facial hair is a form of expression protected by the First Amendment.

The evidence makes it clear that the Fire Department regulations prohibit facial hair, except for noneccentric moustaches.

I note that the plaintiff has a small moustache, as evidenced in the photographs attached to his pleadings; and as evidenced by his personal appearance here in court. Which moustache is obviously not eccentric and obviously not a violation of the regulations. And, therefore, obviously not relevant in the case we have here.

The plaintiff also has a rather full goatee or small beard, which is clearly a type of facial hair prohibited by the Fire Department regulations.

The question, therefore, becomes whether the regulations prohibiting the goatee—which is obviously the reason for the suspension, and I so find—whether this
4 regulation is a violation of the plaintiff's rights to First Amendment expression or whether, in fact, it is a reasonable curtailment of his rights for some justifiable and good reason which the Fire Department advances.

The comments I make concerning the goatee in question need not be too detailed for the reason that the plaintiff was good enough to attach to his pleadings

a photograph. And I merely make the finding that the appearance of the plaintiff in the photograph is substantially identical to his appearance here in court today.

The plaintiff's hair and sideburns can, with some slight stretching, be deemed to be in compliance with Fire Department regulations. Which, once again, reaffirms my contention that the only issue is whether the goatee or small beard was the reason for the suspension and whether that suspension was justifiable under the circumstances.

I find that the plaintiff was suspended for twenty-nine days, by virtue of a notice dated February 28, 1974; and that the suspension notice alleges violations of Regulations 61.001, 61.006 and 51.133 of the Fire Department regulations.

The two regulations in the 61 series are general and
5 are not deemed by me, at least, to be relevant or pertinent to the issues here.

Regulation 51.133 focuses on the precise issue, in that it relates to hair. It is titled "Personal Appearance", but relates almost entirely to hair and refers to haircuts, moustache, sideburns and beard.

I find that the plaintiff's facial hair or his goatee violates Regulation 51.133.

There has been evidence as to whether Lt. Muscare's facial hair does or does not interfere with the proper fit and seal of a face mask or for a breathing apparatus.

What we have before us is the validity of a general regulation and its reasonableness generally. And the question of whether it is reasonable in terms of the individual context, which was raised here, I don't think is relevant.

Neither, as we have said before, is the eccentric moustache issue relevant here, inasmuch as I find Lt. Muscare's moustache is not eccentric, and falls within the permissible moustache rules of the Fire Department.

I am not addressing myself in this ruling at all to the issue of whether the Fire Department may have a dress and appearance code, solely for uniformity and
6 the impression made on the public by what has been called a paramilitary organization. I set that issue aside, as one which need not be considered here.

The question here is whether we have a justifiable regulation on the basis of which the Fire Department purports to justify it. The Fire Department justifies it on safety grounds and relates to face mask fit for self-contained breathing apparatus as the basic reason for the regulation. If it is—whether it is the basic reason or not, or whether it is the only reason or not, really I find that if it is a reason, I need not go any further.

After hearing the evidence, examining the exhibits, I find the justification of the Fire Department, that is, the requirement limiting facial hair for reasons of safety related to the fit of the face mask of self-contained breathing apparatus, is neither capricious nor arbitrary justification. It appears to be grounded in reason. And it also appears to involve a minor abridgement of personal liberty, which is justified by safety requirements.

Fortunately, for the Court, I am not required to become an instant expert on self-contained breathing
7 apparatus. I am required only to determine under law whether the defense rationale and justification for this regulation is reasonable. And in the context of safety, I find that it is.

The plaintiff's motion for a preliminary injunction, therefore, is denied.

• • • • •

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Plaintiff's Motion for Amendment of Judgment and Memorandum in Support of Plaintiff's Motion for Reconsideration has this day been served upon the following counsel at the address below by delivering one copy personally:

Mr. Philip Sheridan
Assistant Corporation Counsel
City Hall
Chicago, Illinois

on March 25, 1974.

/s/ Linda R. Hirshman

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

1 TRANSCRIPT OF PROCEEDINGS

(Filed June 24, 1974)

had in the above-entitled cause before the Honorable Frank J. McGarr, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, March 29, 1974, at the hour of 10:00 o'clock a.m. Present:

Messrs. Jacobs, Gore, Burns & Sugarman
(201 North Wells Street, Room 2122,
Chicago, Illinois, 60606), by
Mrs. Linda Hirshman,
appeared on behalf of the plaintiff;
Mr. Richard L. Curry,
Corporation Counsel, City of Chicago

(City Hall, Room 511,
Chicago, Illinois, 60602), by
Mr. Philip M. Sheridan,
Assistant Corporation Counsel,
appeared on behalf of the defendant.

2 The Clerk: 74 C 656, Francis Muscare versus Robert J. Quinn, et cetera, ruling on plaintiff's motion to reconsider previous ruling and for a further status report.

The Court: I have the motion for amendment of judgment filed by the plaintiff in this case, with a memorandum in support of it. And I have reviewed the matter. And it becomes, in effect, a motion for reconsideration of an earlier ruling.

And my ruling at this time is that the motion for reconsideration and the motion for amendment of judgment are both denied.

This leads me to inquire of you, Counsel, where we go from here; what is the next step?

Mrs. Hirshman: Your Honor, you were, in addition, going to rule on the remaining constitutional challenges, which were still open at the last hearing.

The Court: Well, they were implicit, were they not, in your motion for reconsideration?

Mrs. Hirshman: Well, the motion was for reconsideration of the denial of the preliminary injunction. However, there was also a motion for ruling on the remaining issues. Your ruling—if your denial of my motions intends to encompass the other issues—

The Court: I recall your raising this point, but procedurally I really don't know what I can do concerning it. There was a motion for a preliminary—

3 petition for a preliminary injunction. We had a hearing on it and that was denied. Procedurally that is all I can do.

I regard your raising the remaining issues as an additional argument. And to that extent, my ruling, I suppose, is a ruling on those.

But what we have procedurally is a denial of a petition for a preliminary injunction; and that denial has just been reaffirmed. And where you go from there, I don't know. I would assume that you would want to go as fast to the Court of Appeals as you can.

Mrs. Hirshman: The only thing that remains open in my mind, your Honor, is that when you ruled on the preliminary injunction your findings of fact and conclusions of law were directed to one of three arguments which we raised. And before we go to the Court of Appeals—or hopefully not requiring us to go to the Court of Appeals—I would like to ask you, as I thought I had last week, to rule on the remaining challenges.

The Court: Well, in effect, what I am saying is that you asked me to do so. I considered them—I considered them before, you argued them, in a sense, they are in your brief; and the denial of the petition for a preliminary injunction is deemed to be a ruling on all the challenges you raised.

Mrs. Hirshman: Thank you.

The Court: I think you have to so consider it.

Mrs. Hirshman: In that case, since we have no fur-
4 ther evidence to offer, I would ask that you make this a final ruling.

The Court: All right. The order will be that the preliminary injunction heretofore entered is made a final and permanent injunction, which in my mind renders it an appealable order. And see what the Court of Appeals has to say about it.

Mrs. Hirshman: Thank you, your Honor.

Mr. Sheridan: Thank you.

(Which were all the proceedings had in the above-entitled cause this date.)

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

5 CERTIFICATE

I Hereby Certify that the proceedings had in the above-entitled cause before the Honorable Frank J. McGarr, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, March 29, 1974, were reported in shorthand by me; and that the foregoing transcript, consisting of pages 1 to 4, inclusive, is true and correct.

/s/ Anthony W. Lisanti
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

Name of Presiding Judge, Honorable Frank J. McGarr
Cause No. 74 C 656 Date Mar. 29, 1974
Title of Cause—Francis Muscare -vs- Robert J. Quinn, etc.
Brief Statement of Motion—Ruling on plaintiff's motion to reconsider previous ruling and further status report

Plaintiff's motion for reconsideration and motion for amendment of judgment, are both denied. Plaintiff's motion for a preliminary injunction will be considered as a motion for a permanent injunction without further hearing and is denied. McGarr, J. April 1, 1974

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

NOTICE OF APPEAL
(Filed April 26, 1974)

Notice is hereby given that Francis Muscare, Plaintiff, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order denying Plaintiff's motion for a permanent injunction entered in this action on March 29, 1974.

/s/ Linda R. Hirshman
Attorney for Plaintiff
Francis Muscare

April 24, 1974

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

(Letterhead Of)
JACOBS, GORE, BURNS & SUGARMAN
(Filed May 15, 1974)

May 13, 1974
H. Stuart Cunningham
Clerk to United States District Court
for the Northern District of Illinois
United States Court House
219 S. Dearborn
Chicago, Illinois, 60604

re: Francis Muscare v. *Robert J. Quinn etc. (Case No. 74 C 656)*

Dear Mr. Cunningham:
Plaintiff Francis Muscare has filed an appeal from the decision in the above entitled action in which judgment was entered March 29, 1974. Therefore, in accordance with rule 20 of the Rules of the United States Court of Appeals for

the 7th Circuit, Plaintiff requests that you certify and transmit to the Court of Appeals the entire District Court record in case No. 74 C 656. I am enclosing for your convenience a copy of the docket entries in the above entitled action.
A copy of this request has been served upon the attorney for the Defendants, Mr. Philip M. Sheridan, by mailing a copy thereto, properly addressed, to his office.

Very truly yours
/s/ Linda Hirshman
Counsel for Plaintiff-Appellant

Encl/
LH/mol

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

(Letterhead Of)
JACOBS, GORE, BURNS & SUGARMAN

May 25, 1974

Clerk
United States District Court
219 S. Dearborn
Chicago, Illinois.

Re: Muscare v. Quinn
74 C 656

Dear Sir:
I am enclosing copies of Plaintiff's exhibits entered at the hearing on the preliminary and permanent injunction before Judge McGarr. I am unable to locate the original exhibits marked by the Court Reporter, and I request you to accept these exhibits as substitutes. As the transcript of the hearing reveals, Order No. 685 is Plaintiff's Exhibit 1 and Order No. 749 is Plaintiff's Exhibit 2.
If you have any questions, please call.

Very truly yours,
/s/ Linda R. Hirshman

LRH/mol
Encl.

FILED
MAY 2 1974
H. STUART CUNNINGHAM
At _____ o'clock ____
CLERK
DOCKETED

PLAINTIFF'S EXHIBIT 1

Order Number 749

HEADQUARTERS
CHICAGO FIRE DEPARTMENT

May 15, 1970

TO: All Officers and Members
Chicago Fire Department
SUBJECT: Proper Personal Appearance

Gentlemen:

As of this date order #685 is rescinded and superseded by this order.

It has been noted, lately, that some members have adopted hair styles which deviate from the uniform appearance required by the Chicago Fire Department. Therefore, limitations in this respect are hereby imposed as follows:

A. When a mustache is worn it will not extend beyond a line perpendicular to the corners of the mouth. The full upper lip must be readily visible. (See Figure 1.) Extreme styles are not authorized.

B. Bushy, mod, beatle, duck tail, bangs, or block style hair cuts are not authorized. Sideburns will be terminated no lower than on an imaginary line drawn horizontally from the middle of the ear to the corner of the eye. Neck hair will be no lower than one inch above the collar. The hair outline will follow the contour of the ear and slope to the back of the neck. It will be gradually tapered overall, in order to present a neat appearance. (See Figure 2.)

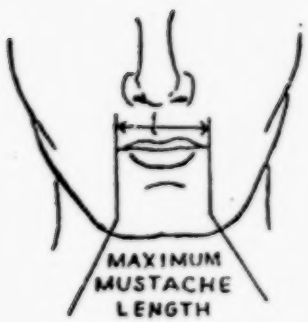

Figure 1

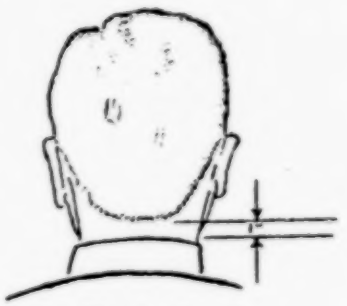

Figure 2

By order of
Curtis W. Volkamer
Chief Fire Marshal

Approved:
Robert J. Quinn
Fire Commissioner

This order is to be read at the next three consecutive roll calls. 19

PLAINTIFF'S EXHIBIT 2

(Filed May 29, 1974)

(Letterhead of)
HEADQUARTERS
CHICAGO FIRE DEPARTMENT

Order No. 685
May 13, 1969

To: Officers and Members
Chicago Fire Department
Subject: Proper personal appearance

Gentlemen:

It has been noted, lately, that some members have adopted hair styles which deviate from the uniform appearance required by the Chicago Fire Department. Therefore, limitations in this respect are hereby imposed as follows:

1. The face shall be clean-shaven, except that a non-eccentric mustache is permissible. The mustache may not extend beyond the width of the mouth.
2. Sideburns shall be trimmed short and shall not come below a point midway between the top and bottom of the ear.
3. Hair shall be worn neatly and closedly trimmed. It shall be clipped at the sides and back so as to present an evenly graduated appearance.

Any question of interpretation of this order may be presented by the individual for clarification and ruling by the Uniform Committee, chaired by 1st Deputy Chief Fire Marshal Raymond Werner [3rd Platoon].

By order of
/s/ Curtis W. Volkamer
Chief Fire Marshal

Approved:
/s/ Robert J. Quinn
Fire Commissioner

This order to be read at the next three consecutive roll calls.

In the

United States Court of Appeals

For the Seventh Circuit

No. 74-1460

FRANCIS MUSCARE,

Plaintiff-Appellant,

v.

ROBERT J. QUINN, individually and as Commissioner, Chicago Fire Dept.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division — No. 74C 656
Frank J. McGarr, *Judge.*

ARGUED JANUARY 16, 1975 — DECIDED MAY 21, 1975

Before CLARK, *Associate Justice**, HASTINGS, *Senior Judge*, and STEVENS, *Circuit Judge.*

PER CURIAM. Appellant-Muscare, a fireman with the Chicago Fire Department since 1955, was suspended from his duties for a 29-day period from February 27 to March 28, 1974, on the ground that his "goatee" violated

* Associate Justice Tom C. Clark, United States Supreme Court (Ret.) is sitting by designation.

the Department's hair regulations.[1] On March 11, 1974, appellant filed a complaint in the United States District Court for the Northern District of Illinois seeking injunctive relief and claiming that his constitutional right to determine his personal appearance had been violated. The district court held a hearing on the matter and denied relief.

On this appeal, Lt. Muscare strenuously argues that this circuit's decision in *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), cert. den., 398 U.S. 937 (1970), compels a recognition of the "right to wear one's hair at any length or in any desired manner [as] an ingredient of personal freedom protected by the United States Constitution," 419 F.2d at 1037, and requires an invalidation of the Department's regulation, absent any showing of "substantial justification" for the restrictions. The Department argues that its regulation can be justified on the basis of: (1) the need to insure the efficient operation of gas masks which must at times be worn by fire-fighters; (2) the need for discipline in a para-military setting; and (3) the need to present a well-groomed and uniform appearance or image to the public. The sufficiency of these various rationales is a

[1] Section 51.133 of the Rules and Regulations of the Chicago Fire Department provides:

> Section 51.133. PROPER PERSONAL APPEARANCE
>
> All members of the Chicago Fire Department shall present a clean and proper appearance in personal care and attire at all times. The face shall be clean-shaven, except that a non-eccentric mustache is permissible. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible. Sideburns shall be trimmed short and shall be no lower than a line from the middle of the ear.
>
> Hair shall be worn neatly and closely trimmed, and the hair outline shall follow the contour of the ear and slope to the back of the neck. It will be gradually tapered overall in order to present a neat appearance.

matter of considerable dispute in the decided cases;[2] however, we find it unnecessary to resolve that controversy in this case, for appellant was suspended without procedural due process.

It appears that appellant's goatee first came to the attention of his superiors in December 1973, when Lt. Muscare, along with the rest of his company, attended a class at the Chicago Fire Academy, taught by one Leonard Johnson, a drill instructor, to train firefighters in the use of self-contained breathing apparatus. At that time, Instructor Johnson, using instructional materials which had been provided him, informed Lt. Muscare's company that facial hair should not be worn with the

[2] Some courts have upheld hair regulations solely on the basis of "paramilitary" discipline or the need to present a well-groomed image to the public, *see Stradley v. Anderson*, 478 F.2d 188 (8th Cir. 1973) (police); *Yarborough v. City of Jacksonville*, 363 F. Supp. 1176 (M.D. Fla. 1973) (firemen); *Akridge v. Barres*, 122 N. J. Super. 476, 300 A. 2d (1973), aff'd, 65 N.J. 266, 321 A. 2d 230 (1974) (police); *Matter of Greenwald v. Frank*, 70 Misc. 2d 632, aff'd 40 A.D.2d 717 (1972) (police); *cf. Anderson v. Laird*, 437 F.2d 912 (7th Cir. 1971) (National Guard); other courts, however, have rejected this view, *see Dwen v. Barry*, 483 F.2d 1126 (2d Cir. 1973) (police); *Black v. Rizzo*, 360 F. Supp. 648 (E.D.Pa. 1973) (distinguishing between police and firemen). More recently, fire departments across the country have begun to justify hair regulations on the basis of safety considerations, in particular, the efficient use of gas masks. Though fundamentally a fact question, most courts have accepted this theory, *see Michino v. Rizzo*, 379 F. Supp. 837 (E.D.Pa. 1974), aff'd (3d Cir., decided March 24, 1975); *Hordorwich v. Bd. of Police and Fire Comm'rs*, 18 Ill. App.3d 20 (1974); *Manco v. Town of Irvington*, 126 N.J. Super. 148, 313 A.2d 219 (1973), aff'd, 64 N.J. 142, 313 A. 2d 204 (1974); *Olszewski v. Council, Fire Dept.*, 70 Misc. 2d 603 (1972). Only a few courts have found no basis for this justification, *see Lindquist v. City of Coral Gables*, 323 F. Supp. 1161 (S.D. Fla. 1971); *Hunt v. Bd. of Fire Comm'rs*, 68 Misc. 2d 261, 327 N.Y. S. 2d 36 (1971). In passing, we note but without holding that the challenged hair regulation, §51.133, does not appear to be co-extensive with the need for safe and efficient use of gas masks and, if that is the sole justification, might well be more narrowly drawn.

self-contained breathing apparatus, since hair prevented the wearer from obtaining a proper seal on the mask portion of the apparatus. Appellant disputed this, saying: "Boston and New York have men with long hair, beards and mustaches, and they are not concerned about it."

During the course of instruction, each member of the company was expected to don a mask and perform various activities, including walking up five floors of the training tower with the gas mask on, sealed, and functioning. Although it is unclear whether Lt. Muscare, as a senior officer, was required to participate in the training, it is clear that appellant did not put the apparatus on and Johnson had no direct knowledge of whether or not Lt. Muscare could obtain a proper seal. Appellant testified that he successfully tested the mask portion of the apparatus during the training and had never experienced any difficulty obtaining a satisfactory mask seal in the past.

After class, instructor Johnson discussed Muscare's conduct with Chief Prohaska, the drillmaster, and stated that he did not know whether Muscare, while wearing his goatee, could get a good seal on a face mask. Later that month, appellant's superior officer, Chief Morgan, warned him that he would not be permitted to continue working as a firefighter unless he shaved off his beard. A few days thereafter, appellant was informed that charges had been filed against him with the administrative authorities. Nothing more appears to have taken place in regard to this matter for two and one-half months. Then, on the morning of February 27, 1974, three of Lt. Muscare's superiors appeared at his duty station and announced that he was being suspended as of that moment and that he was to turn in his equipment and badge.

On March 4, 1974, the Chief of Personnel sent appellant a letter, informing him that he was being suspended for 29 days for alleged violations of §51.133 (hair regulation), §61.001 ("conduct unbecoming a member or employee of the Chicago Fire Department"), and §61.006 (disobedience of orders). The instant action

followed, attacking not only the constitutionality of the hair regulation, but also the summary suspension procedures employed by the Department.

Appellant urges that due process requires that some opportunity to respond to charges against him be made available to the government employee prior to disciplinary action against him. *See Hostrop v. Board of Junior College District No. 515*, 471 F.2d 488 (7th Cir. 1972), cert. den., 411 U.S. 935 (1973). The Department responds that due process was satisfied since appellant had actual notice of the charges against him and had a statutory right to a post-suspension hearing before the Civil Service Commission, which he failed to exercise. We conclude that post-suspension review is insufficient.

Section 10-1-18 of the Illinois Municipal Code (Ill. Rev. Stat. 1973, ch.24) provides in pertinent part as follows:

§ 10-1-18. *Removal — Suspension — Retirement*

> Except as hereinafter provided in this section, no officer or employee in the classified civil service of any municipality who is appointed under the rules and after examination, may be removed or discharged, or suspended for a period of more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense. * * * Nothing in this Division 1 limits the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days except that any employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension.

The Illinois Supreme Court recently had occasion to examine the constitutionality of summary suspension procedures used by the Chicago Police Department and concluded that the demands of due process were met by post-suspension review for suspensions of more than five days and less than 30 days. *Kropel v. Conlisk*, No. 45670 (Ill. S.Ct., decided January 30, 1975). That court, however, did not have the benefit of the United States

Supreme Court's recent decision in *Goss v. Lopez*, 95 S.Ct. 729 (1975). Though *Goss* is a "school" case, it nonetheless points the way to our resolution of the present case.

It can hardly be disputed that appellant, as a twenty-year veteran of the civil service, has a protected property interest in his employment, for "a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process." 95 S.Ct. at 735. Nor can it be disputed that appellant's suspension for 29 days is not *de minimis*, and the "Court's view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." 95 S.Ct. at 737. It remains to answer the question what process is due, for in each situation the requirement is a flexible one.

As the Court has stated before and reaffirmed in *Goss*, "many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case," *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). In the circumstances of America's high schools, the Court thought that notice, an explanation of the evidence the authorities have, and an opportunity to present his side of the story were sufficient to protect the student, and we think that at least this much is required in the circumstances of a public employee's suspension. Not only are alleged transgressions justifying suspension often more serious than school discipline problems, but the

corresponding penalties are potentially more damaging, for reputations, careers, and substantial amounts of lost pay are at stake.[3]

Public employees facing temporary suspension for less than 30 days have interests qualifying for protection under the Due Process Clause, and due process requires at the minimum that they be granted a hearing prior to suspension where they may be fully informed of the reasons for the proposed suspension and where they may challenge their sufficiency. Whether such persons should be granted the full panoply of rights envisioned in Ill. Rev. Stat., Ch. 24, § 10-1-18, for suspensions greater than 30 days is a question which we need not now address, since no hearing of any kind was accorded appellant prior to his suspension.[4]

[3] Here, appellant lost some $1,400 in pay during the 29-day suspension. Such a financial blow can be disastrous to many civil servants. As Judge Skelton noted in *Ricucci v. United States*, 425 F.2d 1252 (Ct.Cl. 1970):

> Few [government employees] earn more than enough to pay their living expenses from month to month, and when their salaries are cut off, they may be in the same destitute circumstances as a welfare recipient whose aid has been discontinued. [425 F.2d at 1257 (concurring opn.).]

[4] The Supreme Court's disposition of *Arnett v. Kennedy*, 416 U.S. 134 (1974), only confirms our analysis of the precise question presented here. There, the Court rejected a due process attack on the discharge of a federal civil servant who had been provided, pursuant to the Lloyd-LaFollette Act, a month's advanced notice of the reasons for his proposed discharge, the materials on which the notice is based, and the opportunity to appear personally before the official having the authority to make or recommend the final decision. Although a three-judge plurality expressed the view that the statute which established the employment property right also established the procedural safeguards to which the employee was entitled, two other Justices concurred in the result solely because they believed that the statute's provision of notice and an opportunity to be heard prior to discharge satisfied the

(Footnote continued on following page)

We do not think that the requirement of presuspension review will result in any unnecessary burden on the administration of public services, nor will it shackle administrators and prevent them from dealing with emergency disciplinary problems, for, as the District of Columbia once pointed out:

> In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing. [R. A. Holman & Co. v. SEC, 299 F.2d 127, 131 (D. C. Cir.), cert. den., 370 U.S. 911 (1962).]

Here, we perceive no such justification for avoiding the requirement of a pre-suspension hearing. Even if we accept the Department's contention that the rationale behind its hair regulation is safety, a number of steps short of summary suspension are available to the Department pending a hearing on a violation of that regulation. Moreover, there is merit to appellant's comment in his brief that:

> The present case hardly presents an emergency requiring the Fire Department to act without any prior process, where the Fire Department utilized the services of Lt. Muscare for a period of over two months from the time in December of 1973 when he was initially reprimanded for wearing a goatee to the time he was suspended on February 27, 1974.

[4] *Continued*
minimal requirements of constitutional due process. In dissent, four other Justice would have gone further and required additional safeguards such as an impartial hearing examiner, the opportunity to present witnesses, and the right to conduct cross-examination. It can hardly be said, therefore, that *Arnett* stands for the proposition that, by accepting governmental employment, a civil servant is entitled only to such procedures as are provided by statute.

Accordingly, we reverse the judgment of the district court and remand for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES COURT OF APPEALS
• • (Caption No. 74-1460) • •
(Dated May 21, 1975)

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED AND REMANDED, with costs, in accordance with the opinion of this court filed this date.

IN THE UNITED STATES COURT OF APPEALS
• • (Caption No. 74-1460) • •
(Dated June 17, 1975)

ORDER

In the petition for rehearing and suggestions for rehearing *en banc* or, in the alternative, for certification of questions of law to the Supreme Court filed in the above-entitled cause, it is suggested that there is a conflict between our decision and *Brubaker* v. *Board of Education, School District 149, Cook County, Ill.*, 502 F.2d 973 (7th Cir. 1975). We note that in *Brubaker* on rehearing *en banc* this court affirmed the district court judgment by an equally divided vote, 502 F.2d 1000, but failed to reinstate the panel opinion. In addition, *Goss* v. *Lopez*, 419 U.S. 565 (1975), which we decided was controlling in *Muscare*, came down after *Brubaker*.

On consideration of the petition and suggestions, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestions, and

all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be and the same is hereby DENIED.

IN THE UNITED STATES COURT OF APPEALS
• • (Caption No. 74-1460) • •
(Dated June 25, 1975)

On consideration of the motion and affidavit of counsel for the defendant-appellee for a stay of mandate,

IT IS ORDERED that the mandate of this court be, and the same is hereby, STAYED to and including July 24, 1975, pursuant to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 74 C 656) • •

Name of Presiding Judge, Honorable Frank J. McGarr
Cause No. 74C 656 Date Aug. 5, 1975
Title of Cause—Francis Muscare -vs- Robert J. Quinn, etc.

On Court's own motion, order cause set for status report on Sept. 5, 1975 at 10:00A.M. McGarr, J.

IN THE UNITED STATES COURT OF APPEALS
• • (Caption No. 74-1460) • •
(Dated August 11, 1975)

This matter comes before the Court on the motion of defendant-appellee seeking to have this Court recall the mandate in this appeal,

IT IS HEREBY ORDERED that said motion be GRANTED and that the Clerk of this Court be ordered

to recall the mandate in so far as said mandate was issued in contravention of this Court's order of July 31, 1975.

IN THE SUPREME COURT OF THE UNITED STATES

No. 75-130, October Term, 1975

Robert J. Quinn, individually and as Commissioner, Chicago Fire Department,

Petitioner,

vs.

Tom C. Clark, Justice, et al.,

Respondents.

ORDER ALLOWING CERTIORARI
(Filed October 14, 1975)

The motion for leave to file a petition for a writ of mandamus is denied. The alternative petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (No. 74-1460) is granted. The case is recaptioned in this Court as: *Robert J. Quinn, individually, and as Commissioner, Chicago Fire Department, petitioner,* v. *Francis Muscare,* to reflect the true respondent in this case.

IN THE UNITED STATES DISTRICT COURT

• • (Caption No. 74 C 656) • •

Name of Presiding Judge, Honorable Frank J. McGarr
Cause No. 74C 656 Date Nov. 18, 1975
Title of Cause—Francis Muscare -vs- Robert J. Quinn, etc.
Brief Statement of Motion—Motion for entry of order granting defendants and printer leave to withdraw record for purpose of having it reproduced for the Supreme Court of U.S.
Names and Addresses of moving counsel—William R. Quinlan, Corporation Counsel of City of Chicago, 511 City Hall, 121 N. LaSalle, Chicago, Edmund Hatfield, Asst. Corp. Counsel
Representing—Robt. J. Quinn, etc.
Names and Addresses of other counsel entitled to notice and names of parties they represent—Linda R. Hirshman, Jacobs, Gore, Burns and Sugarman, 201 N. Wells, Suite 2122, Chicago, Ill.

Enter order granting defendant leave to withdraw the record on appeal from the Clerk in order to prepare Appendix for review by the Supreme Court of the United States. (draft) McGarr, J.

Respectfully submitted,

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DANIEL PASCALE
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